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On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom

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Today, education is perhaps the most important function of state and local governments. . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

–Chief Justice Earl Warren[1]

I. INTRODUCTION: TITLE IX

On February 26, 1992, the United States Supreme Court, in *Franklin v. Gwinnett County Public Schools*,[2] announced that "[i]n sum, we conclude that a damages remedy is available for an action brought to enforce Title IX."[3] This decision has ushered in the post-modern era of Title IX activity. June 23, 1997 will mark the silver anniversary of the passage of Title IX.

1. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).
2. 503 U.S. 60 (1992).
3. *Id.* at 76.

This article examines the representative issues and battles being fought in the educational forum concerning sex discrimination in academics and athletics. The years 1994 and 1995 represented a mixed bag for Title IX of the Education Amendments of 1972 ("Title IX"). The year 1996 resulted in an avalanche of major decisions in this area, which will also be explored.[4] The Title IX statute states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[5] This article focuses on Title IX as it pertains to interscholastic and intercollegiate athletic programs and activities. Due to the influx of decisions concerning Title IX generally, all of the Title IX decisions rendered since 1994 will be probed. There were no changes to the Title IX statute itself, though Congress enacted a truth-in-advertising type of statute, entitled the "Equity in Intercollegiate Athletics Act,"[6] and the Office for Civil Rights ("OCR") implemented regulations.[7] The new Act concerns compiling and making available financial information relating to intercollegiate athletic departments which receive federal funds, either directly or indirectly, through their universities.

The Title IX regulations were enacted in 1975.[8] To date, no changes have been made. The 1979 Health Education & Welfare ("HEW") Policy Interpretation addressing intercollegiate athletics also remains unchanged.[9] The United States Department of Education, through the OCR, is the main entity responsible for enforcement and compliance with Title IX. During April 1990, the OCR unveiled a new *Title IX Athletics Investigators Manual.* No changes were made to the *Manual* despite the meetings that were held during this period to review it. The OCR's actual budget for fiscal year 1995

4. *See* Education Amendments of 1972 §§ 901–909, 20 U.S.C. §§ 1681–1688 (1994).

5. 20 U.S.C. § 1681(a).

6. *See* Improving America's Schools Act of 1994, Pub. L. No. 103-382 (Oct. 20, 1994), which contained the Equity in Intercollegiate Athletics Act. *See also* Jim Naughton & Rachanee Srisavasdr, *Data on Funds for Men's & Women's Sports Became Available as New Law Takes Effect*, CHRON. HIGHER EDUC., Oct. 25, 1996, at A45.

7. 34 C.F.R. § 668 (1996).

8. 34 C.F.R. pt. 106 (1996).

9. 44 Fed. Reg. 71,413 (1979). The OCR is excepted from having to comply with references to the *Women's Equity Action League v. Harris* case contained therein due to the decision in *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990)). 44 Fed. Reg. at 71,418.

totaled the incredulous amount of $58,236,000.[10] Congressional hearings were held on Title IX during May 1995. As a result, during September 1995, the OCR delivered a draft policy clarification entitled "Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test." During January 1996, the OCR issued the official "Clarification of Intercollegiate Athletics Policy Guidance." The states directed few bills to the issue of gender equity in academic athletic programs and activities.[11]

The major issues raised in this time period are: 1) should the "effective accommodation" test be used in analyzing whether a school is satisfying the interests and abilities of students of each sex when separate athletic programs and activities are provided; 2) whether a Title IX cause of action exists for an employee of an educational institution based on sex discrimination, as opposed to merely a Title VII of the Civil Rights Act ("Title VII")[12] cause of action; 3) assuming arguendo that Title IX does allow a private cause of action for athletic department employees of educational institutions, then what protection does Title IX provide where the coach of the women's athletic team is paid less than the coach of the men's team, coaching the same sport, primarily due to the sex of the athletes involved; 4) what standard applies to analyze a Title IX sexual harassment action; and does the standard differ based on whether the sexual harassment concerns a student versus an educational employee, or when the offending party is another student (peer sexual harassment), or another individual; 5) procedurally,

10. *Clinton's Fiscal 1997 Budget Plans for Higher Education & Science*, CHRON. HIGHER EDUC., Mar. 29, 1996, at A43. The estimated OCR budget for fiscal year 1996 was $53,951,000, and the amount requested for fiscal year 1997 was an even $60 million. *Id.*

11. For example, on January 5, 1995, a bill was introduced in Missouri prohibiting "colleges and universities from discriminating on the basis of gender in athletics programs." *State Legislation Relating to College Athletics*, NCAA NEWS, Jan. 25, 1995, at 5. On January 30, 1995, a bill was introduced in New York, S. 1352, which would provide that educational institutions must provide each student with equal opportunity in athletics programs without regard to each student's sex or familial status. *State Legislation Relating to College Athletics*, NCAA NEWS, Feb. 22, 1995, at 14. In Tennessee, a bill was introduced, S. 694, which would require the payment of "equal base salaries to athletic directors and coaches with equal experience limits this requirement to sports in which both men's and women's teams compete at the intercollegiate level." *Id.* An Illinois bill, S. 269, would allow tuition waivers to female student athletes at public universities in the state. *State Legislation Relating to College Athletics*, NCAA NEWS, May 31, 1995, at 5. Representative Kahn of Minnesota introduced a state bill which would amend "the Human Rights Act to permit the restriction of membership on an athletics team (program or event) to participants of one sex whose overall athletics opportunities previously have been limited." *State Legislation Relating to College Athletics*, NCAA NEWS, Dec. 2, 1996, at 19.

12. 42 U.S.C. § 2000e-(2)(a) (1994).

which statute of limitations should be used for a Title IX cause of action, and; 6) does Title IX foreclose a cause of action under 42 U.S.C. § 1983, and vice versa.[13] Is Title IX really an enigma?

The overwhelming number of cases commenced, subject to court decisions, or settled concerned female employees of athletic departments—coaches, athletic directors, or trainers—were predicated on claims of sexual discrimination or retaliation pursuant to three possible federal statutes: Title IX, Title VII, or the Equal Pay Act of 1963 ("Equal Pay Act").[14] There continues to be an absence of a uniform judicial standard concerning these cases from a Title IX perspective.[15] There was a lot of activity concerning female collegiate students seeking to enforce gender equity. A handful of cases were brought by male collegiate students, all seeking to forestall internment of their varsity sports teams. The courts turned back all their attempts. The first co-ed gender equity claims relating to athletics were commenced during the time period. Surprisingly, there was scant legal action instituted concerning interscholastic athletic programs, which continues the trend of 1992–93. Interestingly, the courts rendered the first of a handful of decisions concerning educational programs and activities afforded female prisoners in this country, which underscored their second-class status in this institution.

Collectively, the decisions rendered during 1994–95, with a few exceptions, have a meandering quality about them. Conversely, the decisions handed down during 1996 were being delivered at a staccato pace, with the effect of a volcanic eruption.[16] Part Two reviews decisions involving

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13. 42 U.S.C. § 1983 (1994).

14. 29 U.S.C. § 206(d)(1) (1988).

15. There continues to be no judicial decision interpreting "equal opportunity" as it pertains to coaches, 34 C.F.R. § 106.41(c)(5)–(6), or the following regulations concerning employment: 34 C.F.R. § 106.7 (Effect of employment opportunities), 34 C.F.R. § 106.51 (Employment), 34 C.F.R. § 106.52 (Employment criteria), 34 C.F.R. § 106.54 (Compensation), 34 C.F.R. § 106.55 (Job classification and structure). *See* Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992–93: Defining the "Equal Opportunity" Standard*, 1994 DET. C.L. REV. 953, 998–1016 (1994).

16. *See, e.g.*, United States v. Virginia, 116 S. Ct. 2264 (1996) (single-sex military schools) (discussed *infra* p. 555); Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996) (discussed *infra* p. 623); Waid v. Merrill Area Pub. Schs., 91 F.3d 857 (7th Cir. 1996) (discussed *infra* p. 551); Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395 (5th Cir. 1996) (Title IX sexual abuse) (discussed *infra* p. 640); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996) (Title IX sexual harassment) (discussed *infra* p. 625); Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996) (Title IX peer sexual harassment) (discussed *infra* p. 641); Lakoski v. James, 66 F.3d 751 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 357 (1996) (Title IX employment); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir.

procedural aspects of Title IX. Part Three examines cases dealing with education generally, including separate programs for men and women at public military schools and at prisons (federal and state). Part Four switches to athletic departments, programs, and activities, and monitors decisions involving student athletes and prospective student athletes on the interscholastic and intercollegiate level. Part Five showcases decisions concerning athletic department employees or former employees—brought pursuant to Title IX, but frequently pursuing other federal statutes—in four areas: hiring; equal pay and benefits or comparable pay; termination claims predicated on sex discrimination; and retaliation claims. Part Six focuses on educational employment termination or retaliation generally. Part Seven details the implosion of Title IX case law pertaining to sexual harassment of students or educational employees. This area is subdivided into six categories depending on the status of the individual who allegedly engaged in the harassing actions and the status of the individual allegedly harassed, and includes: coach/student athlete; teacher/student; supervisor/student; other/student; student/student (peer sexual harassment); and educational employment sexual harassment. Part Eight monitors the congressional and federal regulatory action of the United States Department of Education and the OCR.

II. PROCEDURALLY

In *Egerdahl v. Hibbing Community College*,[17] the Eighth Circuit utilized the Minnesota six-year statute of limitations utilized for personal injury actions for a Title IX claim, eschewing a one-year statute of limitations pertinent to the state civil rights actions (Minnesota Human Rights

1993), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996) (discussed *infra* p. 565; Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996) (Title IX contact sport participation) (discussed *infra* p. 564); Pederson v. Louisiana State Univ., 912 F. Supp. 892 (M.D. La. 1996) (Title IX equal opportunity for female collegiate student athletes) (discussed *infra* p. 580); Bartges v. University of N.C. at Charlotte, 908 F. Supp. 1312 (W.D.N.C. 1995) (discussed *infra* p. 608); and Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co., 900 F. Supp. 844 (W.D. Tex. 1995), *rev'd*, 99 F.3d 695 (5th Cir. 1996) (discussed *infra* p. 631). *See also* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996) (declining review of the Fifth Circuit's decision).

17. 72 F.3d 615 (8th Cir. 1995). *See* Nelson v. University of Me. Sys., 914 F. Supp. 643, 648 (D. Me. 1996) (applying Maine's six-year personal injury statute of limitations, rather than the civil rights statute of limitations) (citing Wilson v. Garcia, 471 U.S. 261 (1985)). *See also* Nelson v. University of Me. System, 923 F. Supp. 275 (D. Me. 1996).

Act).[18] Likewise, the Sixth Circuit, in *Lillard v. Shelby County Board of Education*,[19] applied the Tennessee personal injury statute of limitations, rejecting the 180-day period used for filing Title VI administrative complaints. Moreover, during 1994, the district court in *Linville v. Hawaii*[20] concluded that the statute of limitations for filing a Title IX claim is separate and distinct from the statute of limitations imposed for Title VII claims, even if the underlying facts triggering both claims are the same.

In *Topol v. Trustees of University of Pennsylvania*,[21] the plaintiff was allowed to add a claim of retaliation under Title IX. The district court in *Mann v. University of Cincinnati*[22] held that the Title IX scheme is comprehensive enough to subsume 42 U.S.C. § 1983 claims based on other constitutional guarantees, while the Sixth Circuit resolutely came to the opposite conclusion during 1996 in *Lillard*.[23] During 1994, the district court in *Stern v. Milford Board of Education*[24] resolved that an elementary student could pursue a Title IX claim for sexual harassment against the school board due to peer sexual harassment, even though a state claim had been filed. The Seventh Circuit, in *Waid v. Merrill Area Public Schools*,[25] determined that a state claim did not prevent a female employee from pursuing a Title IX claim against the school district.

There is a growing judicial consensus that the parents of a student are not proper party plaintiffs in Title IX actions.[26] However, whether individ-

18. This would contradict the federal district court's position in *Deli v. University of Minn.*, 863 F. Supp. 958, 962 (D. Minn. 1994), which applied a mere one-year statute of limitations utilized for civil rights actions.

19. 76 F.3d 716, 729 (6th Cir. 1996). *See also* Bougher v. University of Pittsburgh, 882 F.2d 74, 77–78 (3d Cir. 1989) (applying the Pennsylvania personal injury statute of limitations).

20. 874 F. Supp. 1095 (D. Haw. 1994).

21. 160 F.R.D. 474 (E.D. Pa. 1995). *See also* Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995) (claim of retaliation under Title IX by female dental student implicitly recognized) (discussed *infra* p. 638).

22. 864 F. Supp. 44, 48 (S.D. Ohio 1994). *See also* Nelson v. University of Me. Sys., 914 F. Supp. 643, 648 n.2 (D. Me. 1996); Mennone v. Gordon, 889 F. Supp. 53, 59–60 (D. Conn. 1995).

23. *Lillard*, 76 F.3d at 729. *See also* Oona R.-S. v. Santa Rosa City Schs., 890 F. Supp. 1452, 1461 (N.D. Cal. 1995).

24. 870 F. Supp. 30 (D. Conn. 1994).

25. 91 F.3d 857, 863 (7th Cir. 1996) ("[W]e can see that Congress closed the avenue created by § 1983 to all plaintiffs who could follow the way created by Title IX.").

26. *See, e.g.*, Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1207–08 (N.D. Iowa 1996) (claims by parents lack merit); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020 (W.D. Mo. 1995); Seamons v. Snow, 864 F. Supp. 1111, 1123 (D. Utah

ual coaches and teachers are proper party defendants, pursuant to Title IX, has resulted in opposite conclusions.[27] Nonetheless, it would behoove the plaintiffs' practitioner to continue to include such individuals in the lawsuits since other causes of action alleged may necessitate such inclusion.

III. EDUCATION

A. *Generally*

In *Clemes v. Del Norte Country Unified School District*,[28] the district court found that a former teacher, a white male, supervising an Independent Studies Program, which had an enrollment of Native Americans, the majority of which were females, had standing under Title IX to pursue a claim of retaliation, allegedly attributed to his actions in seeking to protect the rights of the aforementioned.[29]

1994); R.L.R. v. Prague Pub. Sch. Dist. I-103, 838 F. Supp. 1526, 1530 (W.D. Okla. 1993); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1576–77 (N.D. Cal. 1993).

27. *See* Plotzke v. Boston College, No. 94-12329-EFH (D. Mass. 1995) (allowing individually named defendants to remain as parties to the lawsuit); Mennone v. Gordon, 889 F. Supp. 53, 56 (D. Conn. 1995). *But see* Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 862 (7th Cir. 1996) ("The creation of this incentive indicates that Congress intended to place the burden of compliance with civil rights laws on educational institutions themselves, not on the individual officials associated with those institutions."); Lipsett v. University of P.R., 864 F.2d 881, 901 (1st Cir. 1988); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 166 (N.D.N.Y 1996); Pallett v. Palma, 914 F. Supp. 1018, 1025 (S.D.N.Y. 1996) (Tenured professor charged with sexual harassment named as a defendant "is not a proper party either as an employer or a teaching institution. The federal claims against him are dismissed on the court's own motion."); Rosa H. v. San Elizario Indep. Sch. Dist., 887 F. Supp. 140, 143 (W.D. Tex. 1995), *rev'd*, No. 95-50811, 1997 WL 66087 (5th Cir. Feb. 17, 1997) (discussed *infra* pp. 620, 632); Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 953 (W.D. Tex. 1995), *rev'd*, Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) ("The Title IX claim must be dismissed against individual defendants because Title IX claims may not be asserted against individuals."); Bowers v. Baylor Univ., 862 F. Supp. 142, 145–46 (W.D. Tex. 1994); Floyd v. Waiters, 831 F. Supp. 867, 876 (M.D. Ga. 1993); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1576–77 (N.D. Cal. 1993). *See* Slaughter v. Waubonsee Community College, No. 94 C 2525, 1994 WL 663596, at *3 (N.D. Ill. Nov. 18, 1994) (referred to in Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395, 1400 n.9 (5th Cir. 1996)). *See also* Nelson v. Temple Univ., 920 F. Supp. 633, 638 (E.D. Pa. 1996) (cause of action was not established against a defendant who was the administrator of student organizations and activities at the University).

28. 843 F. Supp. 583 (N.D. Cal. 1994).

29. *Id.* at 590.

A male nursing student challenged his expulsion from the nursing program in *Andriakos v. University of Southern Indiana*,[30] claiming sex discrimination in violation of Title IX. The Seventh Circuit upheld the lower court's determination that the expulsion was based on his failure to satisfy safe and professional nursing skills.[31]

A New York state trial court in *Starishevsky v. Hofstra University*[32] determined that recipients of federal funds are required to adopt and publish grievance procedures, which is in accordance with the directive of the specific Title IX regulations.[33] In another case, a male student at Vassar College received two messages on tape which contained abusive language and threats of physical violence directed at him due to his homosexuality. A male student was charged with having violated the college's sexual harassment policy. He brought suit in *Fraad-Wolff v. Vassar College*,[34] alleging that the school violated a New York state law in not following prescribed procedures in the investigation and adjudication of this matter. On July 12, 1996, the district court disposed of the lawsuit by granting summary judgment to the college stating that "nothing in the student handbook or in the Panel's rules required defendant to declare plaintiff innocent if the Panel was unable to reach a decision."[35]

The female plaintiff in *Ivan v. Kent State University*[36] was enrolled in a joint masters/doctorate program at the University, which required her to complete a master's thesis within two years and maintain a 3.3 grade point minimum. Subsequently, the plaintiff requested permission to skip a fall semester (during which time she gave birth to her child) and forego employment as a graduate assistant for that semester and the following semester. When she returned for the Spring semester, she received an "IP" (in progress) grade for her clinical practicum class. She claimed discrimination in

30. 867 F. Supp. 804 (S.D. Ind. 1992), *aff'd*, 19 F.3d 21 (7th Cir. 1994).
31. Andriakos v. University of S. Ind., 19 F.3d 21 (7th Cir. 1994).
32. 612 N.Y.S.2d 794 (N.Y. Sup. Ct. 1994). *See also* 34 C.F.R. § 106.9.
33. *Starishevsky*, 612 N.Y.S.2d at 797.
34. 932 F. Supp. 88 (S.D.N.Y. 1996).
35. *Id.* at 93.
36. 863 F. Supp. 581 (N.D. Ohio 1994), *aff'd mem.*, 92 F.3d 1185 (6th Cir. 1996). *See* El-Attar v. Mississippi State Univ., 68 F.3d 468 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 817 (1996). In *El-Attar*, the Title IX claim was dismissed concerning University's denial to a doctoral program by the female plaintiff. The plaintiff claimed the denial was based solely on her GMAT score, which disparately impacted on women and individuals who speak English as a second language. The court rejected this argument as the University's admission policy did not focus solely on the GMAT scores.

receiving that grade based on her gender and her pregnancy condition.[37] On September 14, 1995, the federal district court granted the University's motion for summary judgment on both the Title VII and Title IX claims. The district court applied the *McDonnell Douglas* burden-shifting standard used in Title VII cases to the Title IX argument, finding that the defendant's articulated legitimate reasons for the IP grade were not rebuffed by the plaintiff as being pretextual.[38] The court focused solely on the employment aspect. Parenthetically, the First Circuit, in *Cohen v. Brown University*,[39] left open the question of whether the burden-shifting standard should be used in Title IX employment cases.

A female dental student failed to complete ten of her twenty-eight courses and was notified by the college that she was required to repeat her second year in *Murray v. New York University College of Dentistry*.[40] She alleged Title IX sexual discrimination based on a hostile environment created by the actions of one of the patients involved in the school's dental clinic[41] and retaliation in having to repeat the aforementioned school year, after she had allegedly complained about the harassment.

On June 16, 1995, the Second Circuit stated:

> We have noted that in order to make out a Title IX claim based on an educational institution's allegedly discriminatory motivation in taking disciplinary action against a student, the complaint must set forth a "particularized allegation relating to a causal connection between the flawed outcome and gender bias" and must point to "particular circumstances" supporting an inference of gender bias, such as "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." No lesser showing is necessary when the educational institution's challenged

37. *Ivan*, 863 F. Supp. at 584.

38. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *McDonnell Douglas* provides that after a plaintiff establishes a prima facie case of discrimination, including being a member of the protected class, the burden shifts to the employer to advance some legitimate reason for the adverse action. *Id.* at 802. Then if the employer has advanced a non-discriminatory reason for the action, the plaintiff must establish that such reason was pretextual. *Id.* at 804. *See also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

39. 991 F.2d 888 (1st Cir. 1993) (discussed *infra* p. 565).

40. 57 F.3d 243 (2d Cir. 1995) (discussed *infra* p. 638).

41. *Id.* (discussing the hostile environment claim).

> action is not disciplinary but is rather an enforcement of its facially neutral academic standards.[42]

On March 22, 1996, the district court, in *Hall v. Lee College*,[43] determined there was no Title IX violation where a female student was suspended from a private college for allegedly engaging in premarital sex in contradiction of a school policy. The court determined that the plaintiff failed to advance any evidence that the policy would not have been equally applied to male students and thus there was no intentional discrimination on the basis of sex.

B. *Public Military Schools*

The right of females to attend all-male public military schools was examined in *Faulkner v. Jones*[44] and *United States v. Virginia*.[45] Title IX excludes these schools from coverage.[46] On July 22, 1994, the district court in *Faulkner* ruled that The Citadel, a public all-male military college, had to admit Shannon Faulkner into the Corps of Cadets.[47] Three weeks later, the

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42. *Id.* at 251 (citation omitted).

43. 932 F. Supp. 1027 (E.D. Tenn. 1996).

44. 858 F. Supp. 552 (D.S.C. 1994), *cert. denied*, 116 S. Ct. 352 (1995). *See also* Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993) (entitling female student to attend state-appointed all-male military school pending resolution of her equal protection claim).

45. 852 F. Supp. 471 (W.D. Va. 1994) (applying the intermediate scrutiny test, the district court refused to require Virginia Military Academy ("VMI") to admit women), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996). However, it had to provide a comparable program at an all-female state college. The female program was not required to be a mirror-image of VMI or to adopt the same or similar methodology used at VMI. *See also* United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated and remanded*, 976 F.2d 890 (4th Cir. 1994), cert. denied, 116 S. Ct. 2264 (1996). The district court entered judgment for the defendant, Commonwealth of Virginia, and directed the University to undertake one of the following actions: 1) admit women to VMI; 2) establish a parallel institution or programs; or 3) abandon state support. *Id.*

46. Section 901(a)(5) of the Education Amendments directs that "in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex." 20 U.S.C. § 1681(a)(5). Another subdivision, section 901(a)(4), provides that "this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine." *See* 20 U.S.C. § 1681(a)(4). However, the federal military service academies have admitted women since 1976.

47. Faulkner v. Jones, 858 F. Supp 552, 569 (D.S.C. 1994), *aff'd*, 51 F.3d 440 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

Fourth Circuit granted the school's stay pending the appeal.[48] During August 1995, Faulkner entered The Citadel, in Charleston, South Carolina, becoming the first female cadet.[49] Faulkner withdrew within the first week indicating that to stay would only risk her health. On October 16, 1995, the United States Supreme Court ruled that her action was moot and denied Nancy Mellete's motion to intervene or add a party.[50]

In *United States v. Virginia*,[51] a female student challenged Virginia Military Institute's ("VMI") decision refusing her admittance to the all male military school. In this case predicated on violation of the Equal Protection Clause of the Fourteenth Amendment, the Fourth Circuit affirmed and remanded the case, holding that Virginia could maintain single gender college programs as long as *comparable* programs were offered to both men and women.[52] A strong dissent was registered as to the two component arrangement and whether the particular separate-but-equal arrangement proposed by the Commonwealth and adopted by the district court could survive intermediate equal protection scrutiny.[53] The United States Supreme Court agreed to hear this appeal.[54]

On June 26, 1996, the Court, in a 7-1 decision,[55] held that such an all-male military college education violates the Fourteenth Amendment Equal Protection Clause.[56] Justice Ruth Bader Ginsberg, writing for the majority, stated that "[w]omen seeking and fit for a VMI-quality education cannot be offered anything less . . . ."[57] The Court framed the issue as "[n]ot whether 'women—or men—should be forced to attend VMI;' rather, the question is whether the state can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."[58] The Court explained:

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48. *Faulkner*, 51 F.3d at 450.

49. *See* Susan Faludi, *The Naked Citadel*, NEW YORKER, Sept. 5, 1994, at 64 (describing Faulkner's legal odyssey to attend The Citadel).

50. *Faulkner*, 116 S. Ct. at 352.

51. 44 F.3d 1229 (4th Cir. 1995).

52. *Id.* at 1242.

53. *Id.* at 1250 (Phillips, J., dissenting).

54. United States v. Virginia, 115 S. Ct. 281 (1995).

55. United States v. Virginia, 116 S. Ct. 2264 (1996). Justice Clarence Thomas did not participate, as he has a son enrolled at the Virginia Military Institute. *Id.* at 2287.

56. *Id.* at 2269.

57. *Id.* at 2287.

58. *Id.* at 2280. One commentary noted:

> Because the Constitution does not regulate private conduct, the VMI ruling does not apply to private women's colleges, as the 26 private women's colleges who

> Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. . . . Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. . . . The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[59]

The Court further cautioned that

> such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women. Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI.[60]

In reviewing the "parallel" program for women offered at VMI, while excluding all females from VMI's programs and activities, the Court commented, "[h]owever 'liberally' this plan serves the state's sons, it makes no provision whatever for her daughters. That is not *equal* protection."[61]

Justice Rehnquist filed a concurring opinion, predicated on his disagreement with utilizing the "exceedingly persuasive justification" standard, but agreeing with the result of the majority.[62] Justice Antonin Scalia authored a dissent in which he commented that "[t]oday the court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. I do not

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> filed a Supreme Court brief against VMI's position understood. . . . Rather than sounding the death knell for single-sex education, the VMI decision stands for the proposition that individual merit must prevail over stereotyped notions of women's talents and interests.

Marcia D. Greenberger & Deborah L. Brake, *Point of View, The VMI Decision: Shattering Sexual Stereotypes*, CHRON. HIGHER EDUC., July 5, 1996, at A52.

59. *Virginia*, 116 S. Ct. at 2274–75.
60. *Id.* at 2276 (citations omitted).
61. *Id.* at 2279.
62. *Id.* at 2288 (Rehnquist, J., concurring).

think any of us, women included, will be better off for its destruction."[63] The decision will affect The Citadel.[64] VMI did not vote to admit women until September 21, 1996, and thus, the first class with women would not be until 1997.[65] The Citadel ushered in four female cadets during August 1996.

C. *Prison Education*

Jeldness v. Pearce[66] represents the first in a series of decisions brought by female prisoners challenging educational programs. Female inmates in Oregon state prisons asserted that differing educational programs and procedures provided to them violated Title IX.[67] Unlike men, women prisoners were searched in order to travel between prisons and often arrived late for classes. There was no apprenticeship program at women's medium security prisons, and women could not participate in the mechanical trade apprenticeship programs. Male prisoners were entitled to merit pay for participating in vocational training courses, unlike the female prisoners.

The Ninth Circuit held that Title IX does not provide an exemption for educational programs provided at state prisons, which are recipients of federal funds.[68] Further, the appellate court disregarded the Equal Protection

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63. *Id.* at 2291 (Scalia, J., dissenting). *See* James S. Kunen, *One Angry Man: Even on a Conservative Court, Antonin Scalia Manages to Seem Embattled*, TIME, July 8, 1996, at 48–49; David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES MAGAZINE, Oct. 6, 1996, at 68–69.

64. *See* Associated Press, *Judge Calls Recess in Citadel Case*, NEWSDAY, Aug. 13, 1996, at A13 (reporting that attorneys for the United States Department of Justice, on behalf of the three women who plan to attend The Citadel during the 1996–97 academic year, and the school's counsel, were working out details to accommodate the females' attendance at the formerly all-male military college). *See also* Douglas Lederman, *Judge Orders Virginia to Report on Progress in Enrolling Women at VMI*, CHRON. HIGHER EDUC., Dec. 13, 1996, at A34 (relating that the Fourth Circuit "ordered Virginia to 'formulate, adopt, and implement a plan' for enrolling female students."). Fourteen of the 355 applications for the next academic year are from women.

65. *See* Mike Allen, *Defiant V.M.I. to Admit Women But Will Not Ease Rules for Them*, N.Y. TIMES, Sept. 22, 1996, at 1, 36. VMI and The Citadel expended approximately $10 million and $7 million, respectively, in legal costs. *Id.* at 36.

66. 30 F.3d 1220 (9th Cir. 1994). *See also* Archer v. Reno, 877 F. Supp. 372 (E.D. Ky. 1995); Women's Prisoners of D.C. Dep't of Corrections v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994), *vacated in part and modified in part*, 899 F. Supp. 659 (D.D.C. 1995).

67. *Jeldness*, 30 F.3d at 1222.

68. *Id.* at 1225. Title IX defines "educational institution" as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . . ." 20 U.S.C. § 1681(c).

Clause "parity" level in favor of the Title IX "equality" standard.[69] The court stated that "Title IX and its regulations do not require gender-integrated classes in prisons."[70] Furthermore,

> [s]trict one-for-one identity of classes may not be required by the regulations. But there must be reasonable opportunities for similar studies at the women's prison and women must have an equal opportunity to participate in educational programs.... And facilities such as labs, classrooms, and workshops must be comparable to each other.[71]

The court stressed, "[a]nd the inmates must be aware of the opportunity for participation in various programs *before their interests can be assessed.*"[72] The most important aspect of the Ninth Circuit's opinion was its statement that "the absence of discriminatory *motive* does not transform a policy which discriminates on its face into a neutral policy with only a discriminatory effect.... This constitutes disparate treatment, not merely disparate impact.... Such disparate treatment is clearly forbidden by Title IX and its regulations."[73]

In *Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*,[74] the women prisoners were allegedly subjected to sexual assaults by the prison guards. The male prisoners attended full-time adult basic education ("ABE") and General Education Development ("GED") classes, while the women had one teacher, who taught one three-hour ABE class and one three-hour GED class. The female residents also did not receive comparable recreational (exercise) facilities. On December

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69. *Jeldness*, 30 F.3d at 1226. "Research has disclosed no opinion holding that Title IX is coextensive with the Equal Protection Clause." *Id.* at 1228.

70. *Id.*

71. *Id.* at 1229. The "regulations provide that institutions may administer scholarships provided by foreign institutions or wills that are restricted by sex, as long as they make 'available reasonable opportunities for similar studies for members of the other sex.'" *Id.* at 1228 (quoting 45 C.F.R. § 86.31(c)). *See also* Glover v. Johnson, 931 F. Supp. 1360 (E.D. Mich. 1996) (regarding educational opportunities available to female prisoners in Michigan; the action asserted no Title IX cause of action).

72. *Jeldness*, 30 F.3d at 1228 (emphasis added).

73. *Id.* at 1231 (citing 45 C.F.R. §§ 86.31, .51 (1993)).

74. 877 F. Supp. 634 (D.D.C. 1994), *vacated in part and modified in part*, 899 F. Supp. 659 (D.D.C. 1995), *rev'd in part*, 93 F.3d 910 (D.D.C. 1996).

13, 1994, the district court highlighted that "[t]he denial of access to course offerings on the basis of sex is forbidden."[75] Therefore, the

> number of classes offered should at least be *proportionate*, not just to the total number of inmates, but to the number of inmates desiring to take educational programs. In addition, a desire to preserve the state's limited resources can not be used to justify an allocation of those resources which unfairly denies women equal access to programs routinely available to men.[76]

Query, whether the court's proportionate directive is the appropriate one, rather than offering equivalent classes for the female prisoners? The court also elaborated on the aspect of discriminatory intent and stated that "[d]iscriminatory intent, however, is only an issue in cases involving facially neutral policies. . . . When a classification is expressly defined in terms of gender, an inquiry into intent is unnecessary. Defendant's policy of segregating male and female prisoners is just such a gender-based policy."[77]

On August 14, 1995, the district court found that Title IX reaches the prison industries, recreation, work details, and work training.[78] However, on August 30, 1996, the District of Columbia Circuit had reservations over certain of the district court's findings, specifically that "Title IX and equal protection principles are not applicable here because the male and female prisoners whom the district court compared were not similarly situated."[79] The majority noted that "[t]he threshold inquiry in evaluating an equal protection claim is, therefore, 'to determine whether a person is similarly

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75. *Id.* at 674.

76. *Id.* (emphasis added) (citations omitted). The money excuse has been discounted by the courts in the Title IX athletic equal opportunity cases. *See, e.g.*, Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 583 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993); Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994) (discussed *infra* p. 585).

77. *Women Prisoners*, 877 F. Supp. at 675 (citations omitted).

78. *Id.* at 659. *See* Klinger v. Nebraska Dep't of Correctional Svcs., 824 F. Supp. 1374 (D. Neb. 1993) (finding that the failure of the state of Nebraska to provide regularly scheduled pre-release programs for female prisoners, where such programs were provided for the male prisoners violated Title IX, as the pre-release programs were deemed educational), *rev'd*, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1177 (1995).

79. Women's Prisoners of the D.C. Dep't of Corrections v. District of Columbia, 93 F.3d 910 (D.C. Cir. 1996). The appellants did not challenge the provisions that related to educational (academic and vocational) programs. However, they objected to ones that required "them to upgrade the work, recreational, and religious programs available to female inmates, and that relate to law library hours, group events, and transportation to job interviews." *Id.* at 924.

situated to those persons who allegedly received favorable treatment.' . . . We believe the same principle should apply in Title IX cases."[80] Thus, the court in comparing the population size of the prison, security level, types of crimes, length of sentences, and special characteristics, rendered the prisoners dissimilarly situated.[81] The appellate court stated that

> an inmate has no constitutional right to work and educational opportunities. But even though we do not address the scope of Title IX in the prison context, we admit to grave problems with the proposition that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of educational opportunities with which Title IX is concerned.[82]

Judge Rogers, who issued an opinion concurring in part and dissenting in part, took exception to the majority's determination on the equal protection analysis, stating that "[e]ven assuming the government may constitutionally provide separate programs for the sexes, the programs must be substantially equivalent."[83] Thus, "[e]ven if the District may properly segregate prisoners by sex, it does not follow that it may segregate them by sex into unequal facilities."[84] This opinion recognized the heightened scrutiny test mandated by the Court in *Virginia*.[85] It argued that "[t]he District may not treat men and women dissimilarly and then rely on the very dissimilarity it has created to justify discrimination in the provision of benefits."[86] While this equal protection analysis seems more persuasive than the majority approach, the issue would then be a question of fact pursuant to Title IX as to whether certain of the claimed inequities the women prisoners allegedly suffered from came under "educational programs and activities."

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80. *Id.* (quoting United States v. Whiton, 48 F.3d 356, 358 (8th Cir. 1995).

81. *Id.* at 925. The court continued "[w]e do not suggest that these mechanical ratios are a test of comparability; merely that, standing alone, the difference in the number of programs provided by prisons having vastly different numbers of inmates can not be taken as evidence that those in small institutions that offer fewer programs have been denied equal protection. More than that is required." *Id.*

82. *Women's Prisoners*, 93 F.3d at 927.

83. *Id.* at 955 (Rogers, J., concurring in part and dissenting in part).

84. *Id.* at 951.

85. *Id.*

86. *Id.*

In the third action, the Eastern District of Kentucky, in *Archer v. Reno*,[87] determined that there was no violation of Title IX where female prisoners were prevented from completing educational courses to become certified dental technicians. On January 5, 1996, the court ruled that Title IX applies to educational programs or activities conducted by state or local governments. "The statute is silent as to the United States and its agencies. . . . [Thus] the Court concludes that Title IX is not applicable to the national apprenticeship program offered to federal inmates through the dental lab at [the Federal Medical Center in Lexington, Kentucky]."[88] Therefore, the plaintiffs failed to state a Title IX claim of action.

IV. EQUAL OPPORTUNITY ON BEHALF OF STUDENTS

The most significant aspect of the Title IX regulations that pertain to athletic programs or activities is the requirement of equal opportunity for members of both sexes. Specifically, it states that "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide *equal athletic opportunity* for members of both sexes."[89] The regulations then go on to list ten specific, non-exclusive program areas to be analyzed to determine whether equal opportunity has been satisfied. The first program area, and the one which has been at the core of the intercollegiate athletics litigation battles during the 1990s, evaluates "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."[90] The 1979 Policy Interpretation provides that the effective accommodation of student interests and abilities will be assessed in any of the following ways:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; *or* (2) Where the

87. 877 F. Supp. 372 (E.D. Ky. 1995).

88. *Id.* at 379. Title IX states that "[f]or the purposes of this chapter, the term 'program or activity' and 'program' mean all of the operations of (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government." 20 U.S.C. § 1687.

89. 34 C.F.R. § 106.41(c) (emphasis added).

90. *Id.* § 106.41(c)(1).

> members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; *or* (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice or program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by their present program.[91]

A. *Cross-Over Cases*

The Title IX regulations permit qualified separate teams for members of each sex "where the selection for such teams is based upon competitive skill or the activity involved is a contact sport."[92] There were no cross-over cases (cases brought by members of one sex seeking to participate on established teams of the other sex, generally pursued on the interscholastic level by female athletes seeking participation on established all-male teams) on either

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91. HEW Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979) (emphasis added).

92. Section 106.41(b) provides:

> (b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

See generally Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 47–56 (1992).

Michigan state law defines baseball as a "non-contact" sport for interscholastic athletic activities. See MICH. COMP. LAWS ANN. § 380.1289(3) (West 1988), which provides that

> [f]emale pupils shall be permitted to participate in all noncontact interscholastic athletic activities, including archery, badminton, baseball, bowling, fencing, golf, gymnastics, riflery, shuffleboard, skiing, swimming, diving, table tennis, track and field, and tennis. If a school has a girls' team in a noncontact interscholastic athletic activity, a female shall be permitted to compete for a position on any other team for that activity. This subsection shall not be construed to prevent or interfere with the selection of competing teams solely on the basis of athletic ability.

the interscholastic or intercollegiate levels instituted or reviewed during 1994–95, except for the Supreme Court denying certiorari in *Williams v. School District of Bethlehem.*[93] Although not covered by Title IX, this scenario would also apply to the Olympic and professional levels. However, on February 2, 1996, the district court in *Adams v. Baker*[94] ruled that a school district policy which prohibited a female high school student from competing on the boys wrestling team, designated a "contact" sport, would violate her rights under the Equal Protection Clause of the Fourteenth Amendment and granted the plaintiff a preliminary injunction.[95] The court recognized that "wrestling is, not surprisingly, defined as a contact sport"[96] under the Title IX scheme. The court nonetheless continued that "[a]lthough Congress may specify remedies available for a violation of a federally protected right, Congress can not thereby substantively limit constitutional rights."[97] The court also disregarded the school district's argument that participation by a female could lead to sexual harassment charges.[98] The court emphasized that wrestling was an athletic activity and not a sexual activity.[99] The case was settled during the spring, whereby the plaintiff was allowed to tryout for the wrestling team. The agreement is partially confidential.[100] In light of the Supreme Court decision in *United States v. Virginia*,[101] a real concern emerges as to whether the ostensible demarcation of

93. 998 F.2d 168 (3d Cir. 1993) (discussing male student who wanted to participate on the all-female interscholastic field hockey team where no team was provided for the boys).

94. 919 F. Supp. 1496, 1500 (D. Kan. 1996) ("Evidence was presented that there are over 800 girls competing in wrestling in the United States.").

95. *See* Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1123 (E.D. Wis. 1978) (announcing that "[i]t is declared that the defendants' exclusion of the [female] plaintiffs and the class they represent from participation in a varsity interscholastic athletic program in a particular program where such a program is provided for male students violates the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment."). *But see* Kelley v. Board of Trustees of Univ. of Ill., 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995). *See also* discussion *infra* p. 589.

96. *Adams*, 919 F. Supp. at 1503.

97. *Id.*

98. *Id.* at 1504.

99. *Id.*

100. Telephone Interview with Charles O'Hara, counsel for plaintiff (August 22, 1996). Interestingly, in deciding whether to permit the female student to participate on the wrestling team or disband the team, the three female members of the School Board voted to eliminate the team, while the four male members of the board agreed to allow a co-ed wrestling team, according to plaintiff's counsel. *Id.*

101. 116 S. Ct. 2264 (1996) (discussed *supra* p. 556).

certain sports for men only, under the "contact sport" classification, would withstand equal protection scrutiny.

B. *Female Student Athletes*

1. Intercollegiate Level

a. *Cases Commenced Pre-1994 Seeking Reinstitution of Varsity Teams*

(i) *Cohen v. Brown University*: The Trial

On September 26, 1994, the federal trial commenced in *Cohen v. Brown University*,[102] in which the plaintiff was seeking a permanent injunction to restore two women's teams to varsity status. The case was partially settled on September 28, 1994, which ensured comparable treatment for men's and women's varsity programs.[103] The agreement indicated:

> The University maintains the right to distribute University funds as it sees fit, *provided* that such distribution does not disproportionately affect one gender in comparison to the other, *provided further*, however that this . . . be construed to require comparison on a team by team or overall gender basis of actual money expenditures. Comparability shall be determined by the nature of the programs, not the cost. It is understood and agreed that comparability does not imply or mean that every team will be provided identical funding or any other item provided to any other team. Further, different teams may receive different levels of support.[104]

The issue of the effective accommodation of the interests and abilities of the students at the Ivy League University, raised in 34 C.F.R. § 106.41(c)(1), remained viable.

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102. 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993) (granting plaintiffs a preliminary injunction ordering the retention of the two women's varsity teams). *See Gender Equity in Intercollegiate Athletics: Testimony Before the House Subcomm. on Postsecondary Education, Training and Life-Long Learning*, 104th Cong. (1995) (statement of Vartan Gregorian, Ph.D., President of Brown University).

103. Cohen v. Brown Univ., No. 92-0197-P (D.R.I. 1995), Settlement Agreement and Stipulation of dismissal in Regard to Equality of Treatment [hereinafter Agreement]. The Agreement "settles claims in this matter concerning the relative support provided to men and women student athletes and potential student athletes at Brown . . . and shall remain in effect for a period of three years from the date of its execution by the parties." *Id.* at 1, 3. *See also* Oscar Dixon, *Title IX Suit Settled in Part by Brown*, USA TODAY, Sept. 29, 1994, at C13.

104. Agreement, *supra* note 103, at 4–5.

On March 29, 1995, the district court in *Cohen*[105] ruled the defendant University violated Title IX in not accommodating the interests and abilities of the female students.[106] In a sixty-nine page decision, the court painstakingly explicated the "effective accommodation" test under the directive of the First Circuit's 1993 decision.[107] Again, the court stressed that "an institution complies with the three prong test if it meets prong one of the analysis and no other."[108]

The trial judge specifically elaborated on the first prong which requires "substantial proportionality" between the percentage of students and student athletes.[109] The court adopted a plain meaning approach, in that the number of female and male athletes would be based on the number of participation opportunities as manifested by the NCAA squad lists, which was a tangible and easily identifiable number.[110] The court noted that "[t]he Policy Interpretation's three prong test does not mandate statistical balancing. In fact, the test is designed to avoid an absolute requirement of numerical equality."[111] The court ruled that "[a]n institution satisfies prong one provided that the gender balance of its intercollegiate athletic program *substantially mirrors* the gender balance of its student enrollment."[112]

"First, prong one compliance is assessed by comparing the gender ratio of the entire intercollegiate athletic program."[113] The court highlighted that when "significant numerical changes did occur in the intercollegiate athletic

105. Cohen v. Brown Univ., 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996). The decision cited Heckman, *supra* note 15. *Id.* at 188. *See* Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845 (1994) (Mr. Connolly is one of the attorneys for Brown University in this lawsuit.). *See* Walter B. Connolly, Jr. & Jeffrey D. Adelman, *How a University Can Best Comply with Title IX and Win a Lawsuit: Practical Suggestions*, (undated eight-page handout distributed at an April 1996 Title IX forum sponsored by the National Collegiate Athletic Association ("NCAA")) (on file with the *Nova Law Review*); Walter B. Connolly, Jr., *"University In-House Audit of Employment Related Issues to Determine Compliance with Title VII and Title IX and Other Related Issues"* (undated) (104 page handout distributed at an April 1996 Title IX forum sponsored by the NCAA) (on file with the *Nova Law Review*).

106. *Cohen*, 879 F. Supp. at 211 (citing 34 C.F.R. § 106.41(c)(1)).

107. *Id.* at 194.

108. *Id.* at 200.

109. *Id.* at 201–02.

110. *Id.* at 202.

111. *Cohen*, 879 F. Supp. at 199

112. *Id.* at 200 (emphasis added).

113. *Id.* at 202.

program as a whole, these changes were within the control of the university."[114] For example, the University controls the recruiting of student athletes.[115] During the 1993–94 academic year, the percentage of students comprised 48.86% men and 51.4% women, with 61.87% male athletes and 38.13% female athletes.[116] This accounted for a 13% differential between female students and female student athletes. The court also identified "that the 'participation opportunities' offered by an institution are measured by counting the *actual* participants on intercollegiate teams," rather than counting teams' filled and unfilled athletic slots, as the defendant argued.[117] Thus, the 13% disparity did not satisfy the first prong of the effective accommodation test.

The court examined the University's unique two-tiered system. The University characterized its varsity athletic offerings as varsity intercollegiate teams ("university-funded" teams), on the one hand, and donor-funded varsity teams (also known as "club varsities" or "intercollegiate club" teams).[118] The court determined that "university-funded" varsity teams were not comparable to "donor-funded" varsity teams.[119] "During the 1994/95 seasons Brown guaranteed the volleyball team university-funded varsity status for the next five years."[120] Furthermore, "[g]ymnastics is currently supported as a university-funded team as required by court order. However, in the absence of this order, Brown has acknowledged that it would demote gymnastics to donor-funded status."[121]

Second, the University did not satisfy the second prong of a continuing practice of intercollegiate program for women, the underrepresented sex. Rather, the court emphasized that "[s]ince the 1970s, the percentage of women participating in Brown's varsity athletic program has remained remarkably steady."[122] Finally, the court concluded Brown did not currently *fully* and effectively accommodate the interests and abilities, specifically with regard to "maintaining women's water polo at club status and by demoting women's gymnastics where these teams have demonstrated the

114. *Id.*
115. *Id.*
116. *Cohen*, 879 F. Supp. at 192.
117. *Id.* at 202.
118. *Id.* at 189.
119. *Id.* at 212.
120. *Id.* at 192 n.17.
121. *Cohen*, 879 F. Supp. at 192 n.18.
122. *Id.* at 211.

interest and ability to operate as varsity teams."[123] The court also rejected Brown's argument "that it may accommodate less than all of the interested and able women if, on a proportionate basis, it accommodates less than all of the interested and able men."[124]

In conclusion, the court required Brown University to submit a compliance action plan within 120 days, but stayed this directive pending an appeal.[125] During April 1995, the University filed an appeal. On May 4, 1995, Judge Pettine modified his March 29, 1995, judgment, truncating the time for the University to submit its Title IX compliance plan from 120 to 60 days and the court eliminated the stay of the provision requiring the University to submit the plan pending the outcome of an appeal.[126]

On August 17, 1995, the trial court rejected the University's proposed compliance plan, filed on July 7, 1995, which concentrated on adding junior varsity teams for female student athletes, rather than adding new women's varsity teams and cutting men's sports, and crafted its own plan requiring the University to upgrade the women's varsity teams.[127] The court, in terse language responding to the University's proposed plan, stated:

> The proposed plan artificially boosts women's *varsity* numbers by adding *junior varsity* positions on four women's teams.... Counting new women's junior varsity positions as equivalent to men's full varsity positions flagrantly violates the spirit and letter of Title IX; in no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women.[128]

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123. *Id.* at 212.

124. *Id.* at 208.

125. *Id.* at 214.

126. Modified Order at 4, Cohen v. Brown Univ., No. 92-197-P (D.R.I. May 4, 1995).

127. 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). On March 29, 1995, the trial court found in favor of the plaintiffs, ruling that the University had discriminated in violation of Title IX. *Cohen*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd*, 101 F.3d 155 (1st. Cir 1996).

128. Order at 6, Cohen v. Brown Univ., No. 92-197-P (D.R.I. Aug. 16, 1995). The court further stated that "[a]n institution does not provide equal opportunity if it caps its men's teams after they are well-stocked with high-caliber recruits while requiring women's teams to boost numbers by accepting walk-ons." *Id.* at 8.

(ii) First Circuit Affirms that Brown University Violated Title IX

On November 21, 1996, the First Circuit, in a 2-1 decision comprising forty-four pages, affirmed the district court's determination in *Cohen v. Brown University* that the University violated Title IX in not effectively accommodating the interests and abilities of its female student athletes.[129] The First Circuit found

> no error in the district court's factual findings or in its interpretation and application of the law in determining that Brown violated Title IX in the operation of its intercollegiate athletics program. We therefore affirm in all respects the district court's analysis and rulings on the issue of liability. We do, however, find error in the district court's award of specific relief and therefore remand the case to the district court for reconsideration of the remedy in light of this opinion.[130]

First, the appellate court summarized in detail the relevant determinations of the district court, concluding that "[t]he district court did not find that full and effective accommodation of the athletics interests and abilities of Brown's female students would disadvantage Brown's male students."[131] Second, the First Circuit summarized the Title IX predicates and made the first judicial reference to the OCR "Clarification Memorandum," issued on January 16, 1996,[132] "which does not change the existing standards for compliance, but which does provide further information and guidelines for assessing compliance under the three-part test."[133] Third, Senior Circuit Judge Bownes underscored that "[i]n *Cohen II*, a panel of this court squarely rejected Brown's constitutional and statutory challenges to the Policy Interpretation's three-part test, upholding the district court's interpretation of the Title IX framework applicable to intercollegiate athletics . . . ."[134] Then, in addressing the University's argument, which was in essence to begin to

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129. 101 F.3d 155 (1st Cir. 1996).

130. *Id.* at 162.

131. *Id.* at 164.

132. UNITED STATES DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE PART TEST (1996).

133. *Cohen*, 101 F.3d at 167. The court continued, explaining that "[t]he Clarification Memorandum contains many examples illustrating how institutions may meet each prong of the three-part test and explains how participation opportunities are to be counted under Title IX." *Id.*

134. *Id.*

decide *ab initio* the question of Title IX liability, the court pondered the issue of the "law of the case doctrine"[135] and concluded that "[t]he precedent established by the prior panel is not clearly erroneous; it is the law of this case and the law of this circuit."[136] Fourth, the court found that Title IX complies with the Fifth Amendment.[137] An intervening Supreme Court decision in *Adarand Constructors, Inc. v. Pena*[138] does not change the disposition in *Cohen*.[139] The First Circuit articulated that the intermediate standard of scrutiny applies to gender-based classifications,[140] underscoring that, "[a]s explained previously, Title IX . . . is distinct from other anti-discrimination regimes in that it is impossible to determine compliance or to devise a remedy without counting and comparing opportunities with gender explicitly in mind."[141] Fifth, any excluded evidence was deemed harmless.[142]

The University's three most charismatic and dispositive Title IX substantive attacks were: 1) Title IX is an affirmative action or quota statute;[143] 2) Title IX should adopt the "relative interest" of the student athletes to determine compliance;[144] and 3) the Title VII standard should have been applied.[145]

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135. *Id.* at 168. "For the reasons that follow, we conclude that no exception to the law of the case doctrine applies here and, therefore, that *Cohen II's* rulings of law control the disposition of this appeal." *Id.* at 169.

136. *Cohen*, 101 F.3d at 169.

137. *Id.* at 182.

138. 115 S. Ct. 2097 (1995) (remanding for a determination of whether a federal statute which awarded minorities contracts of less than 5% of the total value of contracts per year served a compelling government interest).

139. *Cohen*, 101 F.3d at 155.

140. *Id.* at 182. "Under intermediate scrutiny, the burden of demonstrating an exceedingly persuasive justification for a government-imposed, gender-conscious classification is met by showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives. . . . Applying the test, it is clear that the district court's remedial order passes constitutional muster." *Id.* at 183–84. Amy Cohen, the named plaintiff in *Cohen*, expressed that "[t]here are little girls out there who need women athletes to look up to. And if you take away their opportunity to have women's sports, you take away their interest." Rachanee Srisavasdi, *Athlete Who Sued Brown is Happy With Outcome*, CHRON. HIGHER EDUC., Dec. 6, 1996, at A61.

141. *Cohen*, 101 F.3d at 184.

142. *Id.* at 185.

143. *Id.* at 170.

144. *Id.* at 174.

145. *Id.* at 176.

(iii) First Circuit Disposes of Quota-Affirmative Action Argument

Brown argued that the district court misconstrued and misapplied the three-part effective accommodation test and that such prior determination "effectively renders Title IX an 'affirmative action statute' that mandates preferential treatment for women by imposing quotas in excess of women's relative interests and abilities in athletics."[146] The court recognized:

> Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statue, Title VI. No aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency documents—mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals. Like other anti-discrimination statutory schemes, the Title IX regime *permits* affirmative action. In addition, Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination.[147]

Furthermore, the three-part effective accommodation test applied was proper.[148] The court stated that "[w]e reject Brown's kitchen-sink characterization of the Policy Interpretation and its challenge to the substantial deference accorded that document by the district court."[149] Thus, "[w]e hold that the district court did not err in the degree of deference it accorded the regulation and the relevant agency pronouncements."[150] Furthermore, actual athletic participation opportunities are the measure for determining the first prong addressing substantial proportionality between the percentage of students and student athletes of one sex.[151]

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146. *Cohen*, 101 F.3d at 169.

147. *Id.* at 170–71 (emphasis added). Moreover, the majority stressed that "[f]rom the mere fact that a remedy flowing from a judicial determination of discrimination is gender-conscious, it does not follow that the remedy constitutes 'affirmative action.' Nor does a 'reverse discrimination' claim arise every time an anti-discrimination statute is enforced." *Id.* at 172.

148. *Id.*

149. *Id.*

150. *Cohen*, 101 F.3d at 173.

151. *Id.* "The district court's definition of athletics participation opportunities comports with the agency's own definition." *Id.* at 173.

(iv) Court Rejects Brown University's "Relative Interests" Argument

Perhaps the most novel approach, which, if adopted, would effectively dismantle Title IX, was Brown University's argument that

> an athletics program equally accommodates both genders and complies with Title IX if it accommodates the *relative* interests and abilities of its male and female students. This 'relative interests' approach posits that an institution satisfies prong three of the three-part test by meeting the interests and abilities of the underrepresented gender only to the extent that it meets the interests and abilities of the overrepresented gender.[152]

The majority emphasized that

> [w]e agree with the prior panel and the district court that Brown's relative interests approach 'cannot withstand scrutiny on either legal or policy grounds,' . . . because it 'disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests.'[153]

In pressing the University's quota argument, especially as to the third prong, the court stated that "[i]n any event, the three-part test is, on its face, entirely consistent with § 1681(b) because the test does not *require* preferential or disparate treatment for either gender."[154] Furthermore,

> [o]nly where the plaintiff meets the burden of proof on these elements [the first and third prongs] *and* the institution fails to show as an affirmative defense a history and continuing practice of program expansion responsive to the interests and abilities of the underrepresented gender will liability be established. Surely this is a far cry from a one-step imposition of a gender-based quota.[155]

The court summarized that "[i]n short, Brown treats the three-part test for compliance as a one-part test for strict liability."[156]

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152. *Id.* at 174.
153. *Id.* (citations omitted).
154. *Cohen*, 101 F.3d at 175.
155. *Id.*
156. *Id.*

The court recognized that "Brown also fails to recognize that Title IX's remedial focus is, quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women. . . . It is women and not men who have historically and who continue to be underrepresented in sports, not only at Brown, but at universities nationwide."[157]

In discarding and dismantling the University's relative interest argument, the appellate court stated:

> We view Brown's argument that women are less interested than men in participating in intercollegiate athletics, as well as its conclusion that institutions should be required to accommodate the interests and abilities of its female students only to the extent that it accommodates the interests and abilities of its male students, with great suspicion. To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities. Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.[158]

The court continued:

> Thus, there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. Prong three requires some kind of evidence of interest in athletics, and the Title IX framework permits the use of statistical evidence in assessing the level of interest in sports. Nevertheless, to allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX. We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men. Furthermore, such evidence is completely irrelevant

157. *Id.*
158. *Id.* at 178–79.

> where, as here, viable and successful women's varsity teams have been demoted or eliminated.[159]

The court stated that, "[f]inally, the tremendous growth in women's participation in sports since Title IX was enacted disproves Brown's argument that women are less interested in sports for reasons unrelated to lack of opportunity."[160] The court observed further that, "[h]ad Congress intended to entrench, rather than change, the status quo—with its historical emphasis on men's participation opportunities to the detriment of women's opportunities—it need not have gone to all the trouble of enacting Title IX."[161]

(v) The Lady or the Tiger: Should a Title VII Analysis Be Applied to a Non-Employment Title IX Case?

Brown posited that the district court did not properly apply Title VII standards to its analysis of whether Brown's intercollegiate athletics program complies with Title IX. The court replied that

> [i]t does not follow from the fact that § 1681(b) was patterned after a Title VII provision that Title VII standards should be applied to a Title IX analysis of whether an intercollegiate athletics program equally accommodates both genders. While this court has approved the importation of Title VII standards into Title IX analysis, we have explicitly limited the crossover to the employment context.[162]

The majority stated:

> To the extent that Title IX allows institutions to maintain single-sex teams and gender-segregated athletics programs, men and women do not compete against each other for places on teams rosters. Accordingly, . . . the Title VII concept of the 'qualified pool' has no place in a Title IX analysis of equal athletics opportunities for male and female athletes because women are not 'qualified' to compete for positions on men's teams, and vice-versa.[163]

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159. *Cohen*, 101 F.3d at 179–80.
160. *Id.* at 180.
161. *Id.* at 180–81.
162. *Id.* at 176.
163. *Id.* at 177.

The court elaborated:

> Brown's approach fails to recognize that, because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways. In providing for gender-segregated teams, intercollegiate athletics programs *necessarily* allocate opportunities separately for male and female students, and thus, any inquiry into a claim of gender discrimination *must* compare the athletics participation opportunities provided for men with those provided for women. For this reason, and because recruitment of interested athletes is at the discretion of the institution, there is a risk that the institution will recruit only enough women to fill positions in a program that already under represents women, and that the smaller size of the women's program will have the effect of discouraging women's participation.
>
> In this unique context, Title IX operates to ensure that the gender-segregated allocation of athletics opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner. . . . In contrast to the employment and admissions contexts, in the athletics context, gender is not an irrelevant characteristic.[164]

(vi) The Remedy

The only conflict uncovered by the First Circuit was that "the district court erred in substituting its own specific relief in place of Brown's statutorily permissible proposal to comply with Title IX by cutting men's teams until substantial proportionality was achieved."[165] Brown's proposed compliance plan called for elevating certain women's junior varsity teams. The plan also proposed that "if the Court determines that this plan is not sufficient to reach proportionality, phase two will be the elimination of one or more men's teams."[166] The First Circuit agreed with the district court "that Brown's proposed plan fell short of a good faith effort to meet the

164. *Cohen*, 101 F.3d at 177–78 (citations omitted).

165. *Id.* at 185.

166. *Id.* at 186. Thus, the district court had ordered Brown to "elevate and maintain women's gymnastics, women's water polo, women's skiing, and women's fencing to university-funded varsity status." *Id.* at 187.

requirements of Title IX . . . ."[167] However, "[i]t is clear, nevertheless, that Brown's proposal to cut men's teams is a permissible means of effectuating compliance with the statute. . . . Brown therefore should be afforded the opportunity to submit another plan for compliance with Title IX. . . . In all other respects the judgment of the district court is affirmed."[168]

(vii) Dissenting Opinion

Chief Judge Torruella issued the dissenting opinion finding that the Supreme Court's determinations in *Adarand*[169] and the *United States v. Virginia*[170] applied to *Cohen*.[171] "What is important for our purpose is that the Supreme Court appears to have elevated the test applicable to sex discrimination cases to require an 'exceedingly persuasive justification.' This is evident from the language of both the majority opinion and the dissent in *Virginia*."[172] Herein, such a justification was absent in the dissent's view.[173]

Second, this judge would eliminate "contact sports" from the analysis of the effective accommodation test.[174] "Even assuming that membership numbers in varsity sports is a reasonable proxy for participation opportunities—a view with which I do not concur—contact sports should be eliminated from the calculus."[175] The Chief Judge rationalizes this position by noting that the controlling regulation[176] allows schools to operate single-sex teams in contact sports.

The Chief Judge's opinion is susceptible to rebuttal on several fronts. First, this position is another version of the 1974 Tower Amendment, which would have in effect eliminated revenue-producing sports from the analysis, i.e., men's contact sports, such as football and basketball. Congress has never adopted such proposals to remove any teams from a Title IX analysis.[177] No discussion of the legislative history was included in this part of the dissent. Second, the essence of Title IX is the "equal opportunity"

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167. *Id.*
168. *Cohen*, 101 F.3d at 187–88.
169. 115 S. Ct. 2097 (1995).
170. *See Virginia*, 116 S. Ct. at 2287 (discussed *supra* p. 556).
171. *Cohen*, 101 F.3d at 191.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 192.
176. 34 C.F.R. § 106.41(b).
177. *See* Heckman, *supra* note 92, at 12–13.

mandate. The dissent attempts to elevate the "separate teams" portion of the regulation, which contains the contact sport language, to the superior or primacy position, relegating the "equal opportunity" portion to a secondary or subservient position. Such an attempt belies the Title IX vitality. Even the district court in *Gonyo v. Drake University*,[178] when examining the other regulation, which instructs specifically on athletics concerning the distribution of athletic scholarships,[179] found that it is the "equal opportunity" directive which must take precedence.[180] Third, the contact sport dichotomy sanctioned the status quo by permitting schools to continue to prevent individual, talented females from participating in established all-male contact sports. The Chief Judge, who was quick to cite *Virginia*, should have gone a step further and, based on his reliance on this part of the regulation, determined whether, in light of the "exceedingly persuasive justification" standard articulated in *Virginia*,[181] the contact sport distinction could withstand constitutional scrutiny.

As to the three-part effective accommodation test, the dissent concludes as to the third prong that "[e]ven a single person with a reasonable unmet interest defeats compliance."[182] First, such was not the case herein, and so any such musings must be characterized as dicta. The reality is that during the nearly twenty-five year tenure of Title IX, it is the prospective female student athletes who have had to jump through the obstacle course to have their participation opportunities created, not the males, who have had established teams in place years before enactment of Title IX and thereafter and thus were not required to offer justifications, petitions, and lawsuits. The difference was that the men need only show up and they were suited up, compared to the women who also showed up, accompanied by their attorneys with court orders or settlement agreements. One need only note the struggle of female student athletes at Colgate University to have a club ice hockey team elevated to varsity status, while male student athletes already had a varsity ice hockey team.[183] Third, regardless of the dissent's dismay

178. 879 F. Supp. 1000 (S.D. Iowa 1995).

179. 34 C.F.R. § 106.37(c).

180. *See* Diane Heckman, *Case Summary: Gonyo v. Drake University*, NOLPE NOTES, June–July 1995, at 7–9.

181. *See Virginia*, 116 S. Ct. at 2274–75.

182. *Cohen*, 101 F.3d at 196.

183. Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993). The case was re-instituted as a class action in *Bryant v. Colgate Univ.*, No. 93-CV-1029, 1996 WL 328446 (N.D.N.Y. June 11, 1996) (settled in January 1997 subject to the court's approval) (discussed *infra* p. 579).

with the possibility that "one-woman" tennis, golf, and archery teams might have to be established to fully and effectively accommodate the interests and abilities of the underrepresented sex, clearly whether one person can constitute an intercollegiate athletic team would be a question of fact and a hypothetical clearly not before this court.

Fourth, the dissent apparently ignores the Policy Interpretation, which does not automatically mandate the creation of such teams. A further condition is required for establishment of both contact and non-contact sports. For contact sports,

> [e]ffective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of other sex under the following circumstances: (1) The opportunities for members of the excluded sex have historically been limited; and (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.[184]

Moreover, these same two conditions apply to "non-contact" sports with a further requirement: "(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated teams, or to compete actively on such a team if selected."[185] There was no mention of these further impediments by the dissent. "All of the negative effects of a quota remain, and the school can escape the quota under prong three only by offering preferential treatment to the group that has demonstrated less interests in athletics."[186] Fifth, the dissent's statement belies the facts in this case. Clearly, the female student athletes who originally brought this case were not "less" interested in athletics. Rather, they were forced to go to court to retain teams in sports in which they were very much interested in participating.

Finally, the dissent intimates a possible First Amendment violation due to the private status of this University, stating that the majority "[i]nstead . . . established a legal rule that straight-jackets college athletics programs by curtailing their freedom to choose the sports they offer."[187] No

184. 44 Fed. Reg. at 71,418 (1979).
185. *Id.*
186. *Cohen*, 101 F.3d at 196–97.
187. *Id.*.

mention is made of the Supreme Court decision in *Grove City College v. Bell*,[188] which upheld Title IX as companionable with the First Amendment.

The parties in *Favia v. Indiana University of Pennsylvania*[189] have agreed to put the case on the inactive docket, while still abiding by the pending preliminary injunction.[190]

b. *Cases Commenced Pre-1994 Seeking Elevation of Club Teams*

During August 1993, female students filed a class action lawsuit in *Bryant v. Colgate University*[191] alleging sex discrimination in the intercollegiate athletics program. On January 21, 1994, the plaintiffs filed a motion for summary judgment, and the defendants filed a cross motion for summary judgment. Finally, during the spring of 1996, the judge issued his decision denying both motions.[192] The trial was scheduled for August 1996. However, the trial was rescheduled to February 2, 1997, in order to allow the parties to update discovery material. This case was commenced after a prior lawsuit, *Cook v. Colgate University*,[193] was brought by individually-named female members of the club ice hockey team alleging Title IX violation and seeking to upgrade their team to varsity intercollegiate status, where the men had a varsity intercollegiate ice hockey team.[194] Colgate University has since hired a full-time coach for the women's club ice hockey team and permitted it to compete in a league comprised of varsity teams. On January 17, 1997, the parties settled the *Bryant* case, with the elevation of the women's club team to varsity status (Division III), effective for the 1997–98 academic year, subject to the court's approval.[195]

c. *Cases Commenced During 1994–96 Seeking Elevation of Club Teams*

There were no cases commenced during the three-year period from 1994 through 1996 seeking reinstitution of varsity teams. Rather, a slew of federal class action lawsuits were commenced during 1994 and 1995 seeking elevation of club teams to varsity status. During January 1994, members of

188. 465 U.S. 555 (1984) (discussing associational rights).

189. 7 F.3d 332 (3d Cir. 1993) (denying University's request to modify an injunction requiring the University to reinstate women's gymnastics and field hockey).

190. Letter from plaintiff's co-counsel to author (Oct. 4, 1996).

191. No. 93-CV-1029 (N.D.N.Y. 1993).

192. *Bryant*, 1996 WL 328446, at *11.

193. 802 F. Supp. 737 (N.D.N.Y. 1992).

194. *Id.* at 739–40.

195. Telephone Interview with plaintiff's counsel (Jan. 17, 1997).

the women's field hockey, softball, lacrosse, and crew club sports commenced a federal class action lawsuit in *James v. Virginia Polytechnic Institute & State University*,[196] seeking elevation of their teams to varsity status. Thereafter, on April 17, 1995, the district court approved a settlement which provided that by the end of the 1996–97 academic year the percentage of female student athletes would be within three percentage points of the percentage of female undergraduate students.[197]

An interesting aspect was the provision that if the Supreme Court, the Fourth Circuit, or Congress sets forth a certain percentage of female athletes as the minimum required, then either party can petition the court to modify the order. A women's lacrosse team would be added during the 1994–95 academic year, and women's varsity softball would be offered by 1995–96. The women's athletic scholarships would be within five percentage points of the percentage of undergraduate female students by 1997–98, continuing through 2000–01. Comparable facilities for practice, training, and competitive games for female student athletes will also be provided. A new softball facility would be constructed for use during the spring 1996 season. The plaintiffs' attorneys were accorded $50,000 in fees.

On March 31, 1994, members of the women's soccer team at Louisiana State University ("LSU") commenced a federal class action lawsuit entitled *Pederson v. Louisiana State University*[198] seeking elevation of a women's club soccer team to varsity status.[199] Thereafter, a companion case was commenced on January 3, 1995, by Cindy and Karla Pineda in *Pineda v. Louisiana State University*[200] in the Eastern District of Louisiana, requesting declaratory and injunctive relief against the University and, in particular, seeking a preliminary injunction adding fast pitch softball as a varsity sport. On July 5, 1995, the district court denied the plaintiffs' request for a preliminary injunction requiring: "(a) institution of intercollegiate varsity fast

196. No. 94-0031-R (W.D. Va. 1994).

197. *Id.* (Proposed Settlement Order, Apr. 7, 1995). *See also* Press Release from Virginia Tech's Women's Intercollegiate Sports Expansion Plan (May 16, 1994) (distributed at a 1996 NCAA Title IX forum) (on file with the *Nova Law Review*).

198. 912 F. Supp. 892 (M.D. La. 1996). Thereafter, on May 16, 1994, the plaintiffs filed a motion for a preliminary injunction, and for class certification and a request for an expedited hearing. *Id.* at 897. The court dismissed plaintiffs' motion on October 28, 1994. *Id.* at 898. A stipulation was entered into by the parties in *Pederson* that the instatement of women's varsity soccer team in the fall of 1994 made this request moot. *Id.* at 898 n.2. On September 19, 1994, the defendants filed a motion for summary judgment. *Id.* at 897.

199. *Pederson*, 912 F. Supp. at 897.

200. *Id.* at 899. Defendants' motion to consolidate the *Pineda* and *Pederson* cases was granted on March 30, 1995. *Id.*

pitch softball in Fall 1995, (b) requesting LSU present a plan for compliance with Title IX, and (c) freezing current expenditures and administrative support for male varsity sports at Louisiana State University."[201]

On October 10, 1995, the trial commenced in *Pederson/Pineda v. Louisiana State University.* On January 12, 1996, the district court found that the University had violated Title IX.[202] However, the court emphasized that Title IX distinguishes between "claims for unequal treatment of athletes based on sex ['treatment claims'] and, on the other hand, claims for ineffective accommodation of demands of female and male athletes, *i.e.*, equality of *opportunity* to participate in athletics."[203] The court elaborated that "[a]ll five plaintiffs asserted a claim for unequal treatment of female varsity athletes, including unequal pay to coaches, lesser quality facilities, and other related grievances. An unequal treatment claim presupposes that the claimant was a varsity athlete who was treated unequally based upon her sex."[204] The court stressed the prevailing sentiment that the University is not required to provide any athletic opportunity for its students, but if it elects to do so, it "must provide *equal athletic opportunity* for both sexes and *not exclude* either group from participation because of their sex. . . . Opportunity is the possibility of participation, not the guarantee of participation."[205]

In reviewing the available Title IX precedents and case law, the court stated critically that "[t]he Policy Interpretation has not been approved by either the President or Congress, however, and is also susceptible, in part, to an interpretation distinctly at odds with the statutory language."[206] In examining the three-part effective accommodation test, the first prong would require statistical proportionality between the percentage of students of each sex and the percentage of student athletes; if satisfied, this would constitute compliance with the effective accommodation test. Despite the fact that the First,[207] Third,[208] Sixth,[209] Seventh,[210] and Tenth[211] Circuits have respectively

201. *Id.* at 899. The court's more detailed ruling was contained in an October 28, 1994 ruling. *Id.*

202. *Pederson*, 912 F. Supp. at 917.

203. *Id.* at 904.

204. *Id.*

205. *Id.* at 905.

206. *Id.* at 911–12. The court nonetheless continued that "[d]espite these drawbacks, the Policy Interpretation definitely has a role to play in ascertaining the proper analysis of compliance with Title IX." *Pederson*, 912 F. Supp. at 912. Regardless, "[i]t is the question of how to evaluate equality of opportunity in levels of competition which provides a significant sticking point in the Policy Interpretation's framework." *Id.*

207. *See* Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (discussed *supra* p. 565).

208. *See* Favia v. Indiana Univ. of Pa., 7 F.3d 332 (1993) (discussed *supra* p. 579).

condoned the tripartite test,[212] this district court emphatically stated that as to the first prong, "[t]his Court disagrees with either proposition and the analysis leading to such a result, and denies most emphatically so to hold."[213]

It stated that

> [w]ithout some basis for such a pivotal assumption, this Court is loathe to join others in creating the "safe harbor" or dispositive assumption for which defendants and plaintiffs argue. Rather, it seems much more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static determination of interest and ability as the cornerstone of the analysis can lead to unjust results.[214]

Moreover,

> Title IX does not mandate equal numbers of participants. Rather, it prohibits *exclusion* based on sex and requires *equal opportunity* to participate for both sexes. As appears in the Policy Interpretation, inherent in this prohibition and mandate is knowledge of the *desire to participate, the ability to participate and the level of competi-*

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209. *See* Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994) (discussed *infra* p. 586).

210. *See* Kelly v. Board of Dirs. of Univ. of Ill., 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995) (discussed *infra* p. 589).

211. *See* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993).

212. *See* Heckman, *supra* note 180, at 8.

213. *Pederson*, 912 F. Supp. at 913. The Title IX statute mandates:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C. § 1681(b).

214. *Pederson*, 912 F. Supp. at 913–14. Furthermore, "the jurisprudential emphasis on numerical 'proportionality' is *not found* within the statute or the regulations; rather, it is *inferred* from language in the Policy Interpretation and the statute which argues against such an inference." *Id.* at 914.

> *tion involved.* Ceasing the inquiry at the point of numerical proportionality does not comport with the mandate of the statute.[215]

The district court found that

> [n]o plan exists to institute a method to identify the interests and abilities within the male and female student populations at LSU, nor a plan to evaluate the athletic opportunities presented in light of those identified interests and abilities, nor even a plan to effectively and timely implement the decision it has already made to add intercollegiate varsity women's soccer and fast pitch softball.[216]

Thus, the court directed that LSU "come into compliance immediately or provide this Court with an adequate plan to do so with all due haste."[217] The University filed a compliance action plan on February 1, 1996; however, as of February 3, 1997, the court has yet to officially sanction such plan through a court order.[218]

The court further concluded that the "plaintiffs failed to prove the requisite element of intent necessary to justify monetary damages."[219] This was based on its finding that

> [a]lthough the question is a very close one, this Court holds that the violations are not intentional. Rather, they are a result of arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the byproduct of resistance to change.... LSU is saved from the conclusion that it intended to discriminate in part by the fact that the jurisprudence and regulations regarding Title IX have been confused and unclear from the very beginning and [the athletic director's] contradictory actions.[220]

The court ruled the *Pederson* plaintiffs did not have standing.[221] The plaintiffs have filed an appeal concerning this issue. However, due to an

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215. *Id.* at 914.
216. *Id.* at 921–22.
217. *Id.* at 924.
218. Telephone Interview with Counsel for Plaintiffs (Feb. 4, 1997).
219. *Pederson*, 912 F. Supp. at 918.
220. *Id.* at 918–19.
221. *Id.* at 908. "Plaintiffs have not alleged any experience of the effect, impact or alleged injury resulting from any other alleged discriminatory practices within LSU's existing women's varsity athletics." *Id.* at 904.

intervening Supreme Court decision concerning Eleventh Amendment immunity,[222] this *state* University filed a motion to dismiss with the district court; the decision remains outstanding as of February 3, 1997.

During August 1994, female student athletes sought redress in *Ulett v. University of Bridgeport*[223] against the state University alleging discrimination in the athletic department and requested reinstatement of the women's varsity gymnastics team. The complaint indicated that females comprised 54% of the students and 42% of the student athletes.[224] The men's volleyball team was also eliminated. The plaintiffs sought declaratory and injunctive relief. A consent decree was entered into among the parties on July 7, 1995, with the University agreeing to retain the gymnastics team at least through the 1997–98 academic year.[225]

On May 8, 1995, a class action lawsuit commenced by members of the women's club lacrosse and softball teams in *Boucher v. Syracuse Univer-*

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222. *See* Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114, 1118 (1996). *Seminole Tribe* was a 5-4 decision proclaiming that "each State is a sovereign entity in our Federal system." *Id.* at 1122. The Supreme Court held that "notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress" the power to abrogate a state's Eleventh Amendment Immunity. *Id.* at 1119. Thus, "[e]ven when the Constitution vests Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 1131. Justice Souter, in his dissenting opinion, wrote: "[F]or the first time since the founding of the Republic . . . Congress has no authority to subject a State to the jurisdiction of a Federal court at the behest of an individual asserting a Federal right." *Id.* at 1145 (Souter, J., dissenting). *See also* David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, § 6, at 71. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State." U.S. CONST. Amend. XI. *But cf.* Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988) (requiring that in order to go forward with a Title IX claim against this public University, part of the Commonwealth of Puerto Rico, the plaintiff had to establish that either the University waived its sovereign immunity or that Congress did so when it enacted this federal statute). *But see* the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1) (1994), which provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . [T]itle IX of the Education Amendments of 1972." See also Regents of Univ. of Cal. v. Doe, 116 S. Ct. 2522 (No. 95-1694) (1996) (currently pending in the Supreme Court). More recently, in a post-*Seminole Tribe* case, a federal district court determined that "the University of Minnesota does not have state immunity from an employee's lawsuit under the Americans with Disabilities Act." *University of Minnesota Loses Bid for Legal Immunity*, CHRON. HIGHER EDUC., Dec. 13, 1996, at A35.

223. No. 3:94CV01460(PCD) (D. Conn. July 5, 1995) [hereinafter Consent Decree].

224. *Id.*; Plaintiffs' Complaint at 4, 6.

225. *Ulett*, Consent Decree at 4.

sity[226] sought elevation of those teams to varsity status. The University has announced plans to offer a women's varsity soccer team during the 1996–97 academic year and to offer varsity lacrosse in 1988. On June 12, 1996, the district court granted partial summary judgment to the University, and dismissed the causes of action alleging unequal financial assistance and unequal benefits and opportunities for female varsity athletes.[227] Some controversy exists as to whether class certification should be provided for all the plaintiffs' differing club sports that are seeking elevation. The plaintiffs are awaiting the judge's determination on the plaintiffs' claim for class action status. The defendant filed another motion for summary judgment. The plaintiffs were awaiting rebuttal motion papers due on January 21, 1997.

d. *Other Cases Commenced During 1994–96*

On July 7, 1995, a lawsuit initiated by a softball player, a student assistant softball coach, and a graduate assistant volleyball coach sought proportionate facilities and funding at Northeast Louisiana University in *Hale v. Northeast Louisiana University.*[228] A federal district court in *Harker v. Utica College of Syracuse University*[229] found no violation of Title IX when members of women's athletic teams had to share locker rooms, whereas members of the men's teams did not.[230]

2. Interscholastic Level

On December 22, 1994, the Sixth Circuit, in a 2-1 decision in *Horner v. Kentucky High School Athletic Association,*[231] affirmed in part the lower court's granting of summary judgment that no Fourteenth Amendment Equal Protection Clause claim of discrimination existed where the defendants, the Kentucky High School Athletic Association ("KHSAA") and the Kentucky State Board for Elementary and Secondary Education ("KSBESE"), sanctioned fewer sports for females than the boys and refused to sanction girls' interscholastic fast pitch softball, despite offering baseball for the boys.

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226. No. 95-CV-620, 1996 WL 328444 (N.D.N.Y. June 12, 1996).

227. *Id.* at *4.

228. *See* Will Kowalski, *Athletes, Coaches Turn to Lawsuits to Spur Changes*, USA TODAY, Nov. 8, 1995, at 4C.

229. 885 F. Supp. 378 (N.D.N.Y. 1995).

230. *Id.* at 392.

231. No. C-92-0295-L(J) (W.D. Ky. Jan 11, 1993) (applying a program-wide analysis to determine whether a violation of Title IX had occurred where the state athletic association did not sanction fastpitch softball for females), *aff'd in part and rev'd in part*, 43 F.3d 265 (6th Cir. 1994).

However, the appellate court reversed and remanded the case as to the district court's grant of summary judgment on the plaintiffs' Title IX claim.[232] The court found that both the defendants were recipients of federal funds.[233] For example, the KHSAA "receive[s] a portion of its revenues from dues paid by member schools."[234] The court recognized that while the Title IX "regulations do not impose an independent requirement that an institution always sponsor separate teams for each sport it sanctions . . . the regulations do require that institutions provide gender-blind equality of athletic opportunity to its students."[235] The Sixth Circuit also adopted the three-part effective accommodation test.[236] Again, limited finances will not be countenanced as an excuse for not complying with Title IX, as the court stated "[t]hus, a recipient may not simply plead limited resources to excuse the fact that there are fewer opportunities for girls than for boys."[237] A dissent was filed by Judge Alice M. Batchelder, based on her opinion that the plaintiffs failed to present a *prima facie* case.[238] Thereafter, on March 10, 1995, the Sixth Circuit denied the petitions by the defendants for a rehearing en banc.[239]

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232. *Id.* at 276.

233. *Id.* at 272.

234. *Id.* at 270.

235. *Id.* at 273.

236. *Horner*, 43 F.3d at 273.

237. *Id.* at 275.

238. *Id.* at 276. On July 15, 1994, the Kentucky Assembly approved the following amendment to the relevant state statute to include the following:

> (a) The state board or its designated agency shall assure through promulgation of administrative regulations that if a secondary school sponsors or intends to sponsor an athletic activity or sport that is similar to a sport for which National Collegiate Athletic Association members offer an athletic scholarship, the school shall sponsor the athletic activity or sport for which a scholarship is offered. The administrative regulations shall specify which athletic activities are similar to sports for which National Collegiate Athletic Association members offer scholarships.

KY. REV. STAT. ANN. § 156.070(2)(a) (1996).

Thereafter, the KHSAA "passed a similar by-law, making an exception for schools in which the underrepresented gender votes otherwise." Erin Cook, *Title IX Report Card, Implementation of Fast Pitch Softball Offers New Scholarship Opportunities for Kentucky's Female Athletes*, WOMEN'S SPORTS EXPERIENCE, Oct. 1995, at 13 (newsletter of the Women's Sports Foundation).

239. Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994). A meeting between the parties' attorneys was scheduled for August 1, 1995, "in which a plan was to be devised to remedy the existing Title IX violations that surfaced during the trial." Cook, *supra* note 238, at 13.

On April 5, 1995, four lawsuits, including *Thomsen v. Fremont Public School District # 1*,[240] were simultaneously filed on behalf of female students in a federal district court in Nebraska against school districts in Fremont, North Platte, Minden, and Holdrege, alleging unequal opportunities and unequal benefits and treatment. The lawsuits seek compensatory damages in unspecified monetary amounts, injunctive and declaratory relief based on violations of the Equal Protection Clause, Title IX, and the Nebraska "Equal Opportunity in Education Act" statute.[241]

C. *Male Student Athletes*

All the "equal opportunity" cases brought on behalf of males concerned male collegiate students. The three-year time period also showcased the first co-ed cases brought by collegiate students. As Donna Lopiano, the Executive Director of the Women's Sports Foundation underscored, "[c]utting the level of men's participation needs to be a last choice."[242]

On June 3, 1994, the State University of New York at Albany announced plans to drop men's wrestling, men's tennis, and men's and women's swimming, and add women's field hockey and women's golf. In an anomalous situation, the first of its kind, both male and female student athletes commenced an article 78 lawsuit in state court in *In the Matter of*

240. No. 4CV95-3124 (D. Neb. 1995) [hereinafter Complaint] (on file with the *Nova Law Review*). The Complaint alleges that "Thomsen desires to participate in softball at the varsity interscholastic level (funded by Fremont, as opposed to the privately-funded club sport level), but Defendants refuse to provide such an opportunity." *Id.* at 6. *See* Liberty v. Holdrege Pub. Sch. Dist. # 44, No. 4:95CV3127 (D. Neb. 1995) (complaint on file with the *Nova Law Review*). *See also* Fritson v. Minden Pub. Sch., No. 4:95CV3129 (D. Neb. 1995); Praster v. North Platte Sch. Dist., No. 4:95CV3128 (D. Neb. 1995). All four cases were settled with the parties agreeing to the establishment of female interscholastic softball teams at the respective school districts. Telephone Interview with Plaintiffs' Counsel, *supra* note 218 (Feb. 26, 1997).

241. Complaint at 19, *Thomsen* (No. 4CV95-3124). The Nebraska statute provides:

> The Legislature finds and declares that it shall be an unfair or discriminatory practice for any educational institution to discriminate on the basis of sex in any program or activity. Such discriminatory practices shall include but not be limited to the following practices: . . . (2) denial of comparable opportunity in intramural and interscholastic programs.

NEB. REV. STAT. § 79-3003 (1990) ("Equal Opportunity Act").

242. Donna Lopiano, *Title IX: It's Time to Live Up to the Letter of the Law*, CHRON. HIGHER EDUC., Dec. 6, 1996, at B7. *See also* Heckman, *supra* note 15, at 997 (recommending scrutiny of men's athletic budgets and over-all team sizes).

Kane v. State University of New York at Albany[243] challenging the University's actions as not being in conformity with procedural requirements. On August 19, 1994, the state supreme court trial judge issued a temporary restraining order on behalf of the plaintiffs, precluding the University's planned actions.[244] Thereafter, on August 26, 1994, a stipulation and order was entered into reinstating the aforementioned teams for the 1994–95 academic year, requiring that prompt notice of any future decisions to terminate programs be given and that "all defendants in programs shall be in compliance with federal law and made in accordance with appropriate university procedure."[245]

During May 1995, litigation commenced in a New York state court in *Lichten v. State University of New York at Albany*[246] challenging contempt of the court's August 19, 1994 order in *Kane*. Subsequently during August 1995, the state trial court ruled that although there were some discrepancies in the decision making process to eliminate three men's teams and a women's team (swimming), where other women's teams were established, they did not result in an arbitrary or capricious decision or in violation of Title IX.[247] The court found that the proposed actions would bring the state University into closer compliance with Title IX.[248] The decision was upheld on appeal.[249]

Members of the men's swimming team at the University of California at Los Angeles ("UCLA") sought a preliminary injunction to reinstate their team at the University. On May 17, 1994, a California state court in *Kurth v. University of California Regents*[250] declined to issue a preliminary injunction.

> The court found that a university is permitted to eliminate proportional overrepresentation of male student-athletes to achieve the goal of proportional equality. The plaintiffs have appealed the de-

243. No. 4834-94 (N.Y. Sup. Ct. 1994). *See also* Lichten v. State Univ. of N.Y. at Albany, 646 N.Y.S.2d 402 (N.Y.A.D. 1996) (asserting failure to comply with the court order in *Kane* and seeking restitution of the same sports slated for extinction as in *Kane*).

244. No. 4834-94 (N.Y. Sup. Ct. Aug. 19, 1994).

245. *Id.*

246. 646 N.Y.S.2d 402 (N.Y.A.D. 3d Dept. 1996). The percentage of female student athletes has risen from 35% to 47%. Karla Haworth, *Court Upholds Cutting 4 SUNY-Albany Teams*, CHRON. HIGHER EDUC., Aug. 9, 1996, at A32.

247. *Id.*

248. *Id.*

249. *Id.*

250. No. SC-029577 (Cal. Sup. Ct. Los Angeles, May 17, 1994).

> cision. UCLA had previously announced that it was also cutting women's gymnastics, but reinstated the sport after female student-athletes threatened to challenge such action as a violation to Title IX.[251]

Members of the men's varsity swimming team sought the reinstatement of their team in *Kelley v. Board of Trustees of University of Illinois*,[252] where the women's swimming team was not also scheduled for elimination. On September 1, 1994, the Seventh Circuit affirmed the district court's granting of the defendant's motion for summary judgment.[253] The appellate court supports the principle that "an institution may violate Title IX solely by failing to accommodate effectively the interests and abilities of student athletes of both sexes"[254] and endorsed the three-part effective accommodation test set forth in the HEW 1979 Policy Interpretation.[255] The court noted that "[m]en's swimming was selected for termination because, among other things, the program was historically weak, swimming is not a widely offered athletic activity in high schools, and it does not have a large spectator following."[256]

The Seventh Circuit held that

> [t]he university could, however, eliminate the men's swimming program without violating Title IX since even after eliminating the program, men's participation in athletics would continue to be more than substantially proportionate to their presence in the University's student body. And as the case law makes clear, if the percentage of student-athletes of a particular sex is substantially proportionate to the percentage of students of that sex in the general student population, the athletic interests of that sex are presumed to have been accommodated.[257]

The appellate court also found that the Title IX regulation, 34 C.F.R. § 106.41, "is not manifestly contrary to the objectives of Title IX" and,

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251. ACHIEVING GENDER EQUITY: A BASIC GUIDE TO TITLE IX FOR COLLEGES AND UNIVERSITIES BY THE NCAA 34 (1995).

252. 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

253. 35 F.3d 265, 273 (7th Cir. 1994).

254. *Id.* at 268.

255. *Id.*

256. *Id.* at 269.

257. *Id.* at 270.

therefore, "this Court must accord it deference."[258] Furthermore, the court rejected the plaintiffs' argument that the regulation imposes a gender-based quota system.[259] Also, "[r]equiring parallel teams is a rigid approach that denies schools the flexibility to respond to the differing athletic interests of men and women."[260]

Finally, the court rejected the plaintiffs' argument that the school's decision to eliminate men's swimming while retaining women's swimming would violate the Equal Protection Clause of the Fourteenth Amendment.[261] The Seventh Circuit instead found that Congress has broad powers under the Due Process Clause of the Fifth Amendment to remedy past discrimination.[262]

> Title IX's stated objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex. And the remedial scheme established by Title IX and the applicable regulation and policy interpretation are clearly substantially related to this end.[263]

On January 23, 1995, the Supreme Court denied the request to hear the plaintiffs' appeal.[264]

In the second case evaluating whether a University violated Title IX when it dropped a men's sport, the district court in *Gonyo v. Drake University*[265] denied the plaintiffs' request for a preliminary injunction seeking the retention of the men's varsity wrestling team at this private University during October 1994.[266] On March 10, 1995, the district court granted the defendant's motion for summary judgment as to Title IX, the Fifth Amendment "equal protection clause," and the 42 U.S.C. § 1983 action alleging a violation of the Equal Protection Clause.[267] The court had previously denied

258. *Kelly*, 35 F.3d at 270–71.
259. *Id.* at 271.
260. *Id.*
261. *Id.* at 272.
262. *Id.*
263. *Kelly*, 35 F.3d at 272.
264. 115 S. Ct. 938 (1995).
265. 837 F. Supp. 989 (S.D. Iowa 1993).
266. *Id.* at 990.
267. Gonyo v. Drake Univ., 879 F. Supp. 1000 (S.D. Iowa 1995).

the plaintiffs' motion for a preliminary injunction to refrain from eliminating the men's varsity wrestling team at the end of the 1992–93 academic year.[268]

The governing regulation[269] directs substantial proportionality between the percentage of athletes and athletic scholarships.[270] The plaintiffs argued that the University was not in compliance with this regulation, identified as the "scholarship test."[271] The plaintiffs argued that a violation of *either* section 106.37 *or* section 106.41 should constitute a violation of Title IX.[272] The court disagreed, stating:

> [T]he 'safe harbor' of proportional participation extends beyond the question of compliance under section 106.41. As I read Title IX and the implementing regulations, the paramount goal of Title IX is equal opportunity to participate.... Scholarships may be a significant aspect of this opportunity, and an important tool in creating opportunity, but they remain only a part of the larger picture, logically subordinate to the overarching goal.[273]

During February 1995, male wrestlers instituted a suit in a New York state court in *Cooper v. Peterson*[274] after St. Lawrence University announced the decision to drop wrestling after the 1994–95 seasons. The case was predicated primarily on alleged breach of contract.[275] No Title IX claim was made. New York has no state statute comparable to Title IX as it pertains to intercollegiate athletics. The defendant thereafter filed a motion to dismiss, which the state trial court judge granted during April 1995.[276] "In dismissing the claim for sex discrimination, the court noted that the wrestlers had failed to present sufficient information demonstrating that they had been excluded on the basis of gender or subjected to discrimination in the athletics program."[277] No appeal was taken.

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268. *Gonyo*, 837 F. Supp. at 996.
269. 34 C.F.R. § 106.37(c).
270. *Gonyo*, 879 F. Supp. at 1004.
271. *Id.*
272. *Id.* at 1005.
273. *Id.*
274. 626 N.Y.S.2d 432 (N.Y. Sup. Ct. 1995).
275. *Id.*.
276. *Id.* at 435.
277. *Governmental Affairs Report*, NCAA NEWS, Aug. 30, 1995, at 5.

Members of the men's soccer and wrestling teams at Illinois State University commenced a lawsuit during September 1995 seeking reinstitution of their teams.[278]

V. EQUAL OPPORTUNITY IN ATHLETIC EMPLOYMENT

As indicated, the bulk of cases revolved around the "equal opportunity" cases on behalf of female athletic employees or coaches of female teams, all on the post-secondary level.[279] Title VII states in pertinent part that

> [i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .[280]

Title VII, which prohibits sex discrimination in certain employment situations, requires satisfaction of either claim: a disparate treatment claim where the individual alleges intentional discrimination by the employer, or a disparate impact claim where a facially neutral or nondiscriminatory practice has a disproportionate negative impact on the hiring, firing, or terms and conditions of that employment for members of one sex over the other.[281]

The crux of the Equal Pay Act is that equal pay must be accorded to employees of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ."[282] The Ninth Circuit, in *Hein*

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278. Kowalski, *supra* note 228.

279. *See* Heckman, *supra* note 15, at 998–1018, for exploration of the three federal statutes (Title IX, Title VII, and the Equal Pay Act) routinely used in educational employment cases and for additional background and discussion of the case law issued concerning the athletic employment cases commenced prior to 1994.

280. 42 U.S.C. § 2000e-2(a) (1994). *See also* Civil Rights Act of 1991, 42 U.S.C. § 1981 (Supp. V. 1993).

281. *See* EEOC v. Metropolitan Educ. Enters. Inc., 60 F.3d 1225 (7th Cir. 1995), *rev'd*, 117 S. Ct. 660 (1997) (addressing the issue of the number of employees working, as Title VII only covers employers that have "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.")

282. 29 U.S.C. § 206(d)(1) (1988). *See* Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993) (female English literature professor at Rice University failed to establish a claim of discrimination pursuant to the Equal Pay Act or Title IX). *See also* Houck v. Virginia Polytechnic Inst. & State Univ., 10 F.3d 204 (4th Cir. 1993) (discussing female professor who failed to establish a prima facie case of discrimination pursuant to the Equal Pay Act).

v. Oregon College of Education,[283] determined that the Equal Pay Act focuses on jobs that require equal skills and not to employees that possess equal skills. The Eleventh Circuit, in *Brock v. Georgia Southwestern College*,[284] stated that "[i]t is important to bear in mind that the prima facie case is made out by comparing the *jobs* held by the female and male employees and showing that these jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs."[285]

While the Title VII and Equal Pay Act statutes have been thoroughly vetted by the courts, Title IX, which pertains only to employment at educational institutions which are recipients of federal funds, has yet to be fully fleshed out. A patchwork of case law is developing, borrowing on the other two federal employment related statutes, but still not explicitly focusing on the Title IX regulations that address employment[286] or the requirement within 34 C.F.R. § 106.41(c)5–6 that where schools provide separate teams for members of each sex, that those students must have equality in coaching.

Inexplicably, there has not been one court decision, to date, involving sex discrimination by a coach or athletic director at an educational institution which discusses any of the specific Title IX regulations governing employment, not even in dicta, or a footnote. Query: Where University A hires a nationally renown successful male basketball coach for the men's intercollegiate basketball team with a salary to reflect that distinction, however, the women's intercollegiate basketball team is coached by a female former player, whose salary is appreciably less than that of the men's team—has the school triggered Title IX sexual discrimination in employment and has the school provided equal coaching to both the men's and women's team, and the attendant student athletes, as required by Title IX regulations? Second: Does paying a coach of a men's team a greater amount than the coach of the women's team for the same sport, on the same divisional level, trigger a violation of Title IX, as opposed to the Equal Pay Act? For example, the NCAA has three divisions: Division I (most prestigious); Division II; and

283. 718 F.2d 910 (9th Cir. 1983) (concerning litigation by a female assistant professor in the physical education department whose coaching duties approximated one-third of her responsibilities and teaching duties comprised two-thirds, as compared to the men's varsity basketball coach whose coaching duties approximated one-fourth and teaching duties three-fourths).

284. 765 F.2d 1026 (11th Cir. 1985).

285. *Id.* at 1032 (emphasis added).

286. *See, e.g.*, 34 C.F.R. § 106.7 (Effect of employment opportunities); § 106.51 (Employment); § 106.52 (Employment criteria); § 106.54 (Compensation); § 106.55 (Job classification and structure).

Division III (non-athletic scholarship). Third: Should courts place merit when the men's male coach has greater accomplishments than the women's female coach, considering the following two factors?

First, ostensibly, women have been and continue to be almost exclusively absent from coaching men's teams on the collegiate, and thereafter, the Olympic, and professional levels.[287] During the 1995–96 season, on the collegiate level, there was not one woman coaching Division I men's football, baseball, or hockey. A lone female, Kerri-Ann McTiernan, was coaching a men's intercollegiate (non-Division I) basketball team at Kingsborough Community College, in New York, and Dot Murphy is an assistant football coach at Hinds Community College, a non-NCAA institution in Mississippi. No women coached any of the United States men competing in the 1996 Summer Olympics in Atlanta.[288] While affirmative efforts have been voiced about bringing more black (male) coaches into the professional ranks, there has not been even any rhetoric about commencing the inclusion of women into this segment of the job market, despite the passage of almost twenty-five years since Title IX's enactment, or the expanse of time after Title VII's enactment. No real progress has been made, no trickle up effect has occurred due to the generation of females who have played interscholastic and intercollegiate sports.[289] Consider the

287. For example, in 1996, there was not one woman coaching in the National Football League ("NFL"), the National Basketball Association ("NBA"), Major League Baseball ("MLB"), or the National Hockey League ("NHL"). Moreover, there has never been a female referee in either MLB, the NFL, NHL, or Major League Soccer. Julie Sommer, *Gender is Deciding Factor for International Referees: Highly Qualified Referee Denied Opportunity*, WOMEN'S SPORTS EXPERIENCE, Dec. 1996, at 11–12.

288. Moreover, parity still has not been reached in the number of athletic events available for men and women. For example, for the first time women competed in softball at the 1996 Summer Olympics, but presently it has not received status as a permanent sport to be included for female athletes at future Olympics. Females comprised 34% of all athletes at the Summer Olympics. Women's basketball was not added as an Olympic sport until 1976, and a women's marathon was not included until the 1984 Summer Olympics. Moreover, only ten out of 113 members of the influential International Olympic Committee are women. There is only one woman on the IOC Executive Board, Anita DeFrantz. *See* Christopher Clarey, *Perspective: Swifter, Higher, Stronger... Gender*, N.Y. TIMES, Nov. 10, 1996, § 8, at 9. Within the next 10 years, each of the 197 participating countries will be required to have women comprise at least 10% of their decision-makers, which the IOC will be required to do so by the year 2000. Jody Smith, *International Olympic Committee Increases the Role of Women*, WOMEN'S SPORTS EXPERIENCE, Feb. 1996, at 13. The *New York Times* devoted an entire issue of its Sunday magazine to women's participation in the Olympics. N.Y. TIMES MAGAZINE, June 23, 1996, § 6 (24th anniversary of Title IX).

second factor: Since there are few outlets for women to coach professional female athletes,[290] a class comparison of a male coach with a female coach impacts to the detriment of a female coach—and so could be used in perpetuity to relegate the female coach to a lesser salary than her male counterpart. So when the judges compare the backgrounds of a George Raveling to a Marianne Stanley, or a Butch Beard to a Sanya Tyler, it is not surprising that the men are coming out on top. However, even if the courts allow this approach for an Equal Pay Act analysis (despite the aforementioned appellate decisions that instruct that the focus should be on the job skills, rather than individual skills), there has yet to be a direct answer as to whether this approach can be utilized when examining a Title IX cause of action. The essence of this commentary was first raised in 1994. Three years later, there has been no advancement in the Title IX panorama.

The 1995 Women's Basketball Coaches Association ("WBCA") survey found inequities between coaches of NCAA men's versus women's basketball teams in the percentages of radio and television shows, amenities (such as country club memberships, automobiles and amenities), bonuses for team performance, and program support (such as secretarial assistance, promotion and sport information staff time)—all not surprisingly favoring coaches of the men's NCAA Division I basketball teams compared to coaches of the women's basketball teams.[291]

A. *Hiring*

There were no cases initiated concerning hiring policies of women coaching men's teams, which continues the dearth of case law in this area

289. This coincides with the complete blackout of any women athletes employed by the men's teams in the NFL (there has never been a female NFL player), NBA (likewise, there has never been a female NBA player), MLB (the Colorado Silver Bullets, a women's baseball team had played against minor league baseball players, but the women are not part of the Major League Baseball Players' Association), or the NHL (during the early 1990s, a Canadian female player, Manon Rheaume, briefly played on a minor league team).

290. For example, since Title IX's enactment, there have been sporadic professional women's basketball leagues; however, 1996–97 will feature two women's basketball leagues, including the American Basketball League, which commenced operation during the Fall 1996, and the National Basketball Association sponsored one, the Women's National Basketball Association, which will commence operation during the summer of 1997. *See* Kate McCormick, *Spotlight: Women's Sports on the Professional Track-Part I*, WOMEN'S SPORTS EXPERIENCE, Oct. 1996, at 19–21. While the women's baseball team, the Colorado Silver Bullets has been playing for the last couple of years, the Women's Professional Fastpitch League will debut during June 1997. *Id.* at 19.

291. WBCA 1995 Division I Salary Survey (1995) (on file with the *Nova Law Review*).

since Title IX's inception.[292] The results of the ongoing longitudinal study done by Professors Acosta and Carpenter concerning NCAA colleges and universities revealed further disturbing news with their latest update. As of 1996, only 47.7% of the coaches of women's teams are women, a decline from the 1994 figure of 49.4%.[293] Furthermore, only 18.5% of all women's programs are headed by a woman, also a decrease from the 1994 figure of 21%; and only 11.9% of colleges and universities with a full-time sports information director had a woman at the helm.[294] In Division I in 1996, the research indicated that men comprised a startling 91.2% of the athletic directors of women's programs.[295] In 1996, only a few Division I schools had any women in athletic administration positions.[296] Merely five of the NCAA's Division I-A athletic directors are women.[297]

B. *Equal Pay*

The Title IX regulation governing compensation states:

> A recipient shall not make or enforce any policy or practice which, on the basis of sex:
> (a) Makes distinctions in rates of pay or other compensation;
> (b) Results in payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and

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292. *See* Grebin v. Sioux Falls Indep. Sch. Dist., 779 F.2d 18 (8th Cir. 1985) (teaching position for which a female applied was filled by a man, who could also coach football). In this Title VII case, the Eighth Circuit determined the school district had a legitimate nondiscriminatory reason for not hiring the plaintiff, as the male applicant was better qualified. *Id.* at 21. *See also* Sennewald v. University of Minn., 847 F.2d 472 (8th Cir. 1988) (discussing another Title VII case concerning a female assistant softball coach who was not promoted to a full-time position).

293. R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal Study-Nineteen Year Update 1977–96*, at 1 (unpublished manuscript on file with the *Nova Law Review*) [hereinafter Acosta & Carpenter]. *Cf.* Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239 (1991) (examining, *inter alia*, the low number of African-American women coaching).

294. Acosta & Carpenter, *supra* note 293, at 11.

295. *Id.*

296. *Id.* at 12.

297. The women athletic directors are Andrea Seger of Ball State University, Deborah Yow of University of Maryland, Cary Groth of Northern Illinois University, Sandy Barbour of Tulane University, and Barbara Hedges of University of Washington. *Arena*, NEWSDAY, Sept. 14, 1996, at A28.

> responsibility, and which are performed under similar working conditions.[298]

There has yet to be a court decision in the area of athletics employment at an educational institution which addresses this specific regulation.[299]

There were only two cases exploring the equal pay considerations for coaches, who were still in their positions while the litigation ensued. The jury trial in *Tyler v. Howard University* was conducted in a District of Columbia Superior Court during 1993.[300] The jury rendered a verdict of $2.39 million for Sanya Tyler, the women's basketball coach at Howard University. On June 29, 1993, the judge reduced the verdict, based on duplicate recovery for the same injuries under alternate legal theories, to $1.06 million against the University, and retained the original $54,000 verdict against the individual defendant.[301]

On September 15, 1995, the trial judge finally issued an order and memorandum opinion responding to the July 1993 post-trial motions filed by the defendants.[302] The four causes of action asserted were: 1) Equal Pay Act; 2) sex discrimination pursuant to Title IX and a District of Columbia statute; 3) retaliation; and 4) defamation. The court granted the defendant's motion for judgment notwithstanding the verdict as to the Equal Pay Act based on the plaintiff not being selected as the Athletics Director in 1991 and a claim of retaliation.

Tyler had been the full-time Associate Athletic Director since 1986, and part-time women's basketball coach since 1980, for an aggregate salary of $62,000. On July 1, 1990, a full-time men's basketball coach was hired at an annual salary of $78,500, plus access to a leased car, with a four-year contract with an option for an additional year.[303] Tyler was paid $44,436.[304]

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298. 34 C.F.R. § 106.54 (emphasis added). Note that the regulation does not include the language, on the basis of sex *of the individual*, to track the Title VII verbiage.

299. *See* Heckman, *supra* note 15, at 1014–15.

300. *See* Tyler v. Howard Univ., No. 91-CA11239 (D.C. Sup. Ct. Sept. 15, 1995) (Memorandum Opinion) [hereinafter Mem. Op.]; Pitts v. Oklahoma, No. 93-1941-A (W.D. Okla. 1993) (discussed in Heckman, *supra* note 15, at 1010).

301. *Id.* The court awarded $600,000 for lost wages pursuant to Title IX and the District of Columbia Human Rights Act; $138,000 damages pursuant to the Equal Pay Act; $72,00 for emotional distress under the sex discrimination claim; $250,000 damages for emotional distress under the retaliation claim; and $54,000 for the defamation claim. *Id.*

302. The court stated that resolution of the post-trial motions was intentionally delayed awaiting the development of appellate judicial precedent under the Equal Pay Act and Title IX. Mem. Op., *supra* note 300, at 2 n.1.

303. *Id.* at 9.

Tyler applied for the top position, which went to another candidate outside the University.

The court noted that the issue concerning the Equal Pay Act was whether this federal statute was violated due to the difference in salary and conditions paid to the men's and women's basketball coaches.[305] The University argued that although the head full-time basketball coaches have the same job title and the same general job description, this did not entitle them to the same or identical salary.[306] Rather, the jobs must be "substantially equal."[307] The court cited an appellate opinion which stated that "[s]kill includes consideration of such factors as experience, training, education and ability. . . . Responsibility involves the degree of accountability required in the performance of the job; the controlling factor is not job title but job content—'the actual duties that the respective employees are called upon to perform.'"[308] The court found the Ninth Circuit decision in *Stanley v. University of Southern California*[309] was persuasive on the equal pay issues.

Howard University's men's basketball coach was a former NBA player and coach, who authored a book and did television color commentary, and according to the University, the school "was forced to compete with market forces," in obtaining his services.[310] Clearly, he had more playing experience and a higher level of coaching experience than the plaintiff. However, considering the limited or nonexistent professional basketball opportunities for women in this country, certain men will always come in with an advantage (as result of historical discrimination against women in athletic and employment situations, which necessitated federal statutes such as Title IX, Title VII, and the Equal Pay Act).

The court also relied on the fact that the men's basketball team

304. *Id.*

305. *Id. See also* Debra E. Blum, *Pay Equity for Coaches: Some Colleges Give Substantial Raises to Mentors of Women's Teams*, CHRON. HIGHER EDUC., Apr. 6, 1994, at A53 (designating specific universities which are awarding coaches of their women's teams with considerable raises to more closely align their salaries with those of the men's coaches, such as women's basketball coaches at The Florida State University, Texas A & M University, University of Florida, and University of Kansas).

306. Mem. Op., *supra* note 300, at 2 n.1.

307. *Id.*

308. *Id.* at 11.

309. 13 F.3d 1313 (9th Cir. 1994).

310. Mem. Op., *supra* note 300, at 15–16.

> also served to generate income from the viewing public and spectators, the media, and from other sources to a far greater degree than did the women's basketball team. This revenue-generating function and responsibility placed far greater pressure on Coach Beard to win than was the degree of pressure placed on Ms. Tyler with reference to the women's basketball team. Thus, for this reason, their jobs were not substantially equal.[311]

The court noted that

> [a] question may be raised as to whether societal factors, such as far greater spectator interest in men's basketball than women's basketball, and greater media and television interest and coverage of men's sports, as external factors, should be allowed to justify a disparity or differential in the pay of men and women coaches for the same athletic activities.[312]

The court responded that

> [t]his Court is constrained to follow the existing judicial precedent and leave it to the appellate courts to grapple with the issue of such market forces, as spectator interest and television and media coverage, justifying paying women less compensation than their male counterparts for basically the same function, except for the impact of these market forces over which universities and colleges claim they have no control.[313]

The defendant's motion was denied as to the sex discrimination claims of being undercompensated as women's basketball coach, involving the pay and working conditions, pursuant to Title IX and a District of Columbia statute. As to the retaliation claim, the court expounded:

> While there was some dispute and misunderstandings as to office space assignment, available funds because of budget restraints, and other minor related issues, this Court concludes that the evidence concerning these matters did not rise to the level of establishing the

311. *Id.*
312. *Id.*
313. *Id.* at 18.

> required nexus so that a reasonable jury could find that this activity was retaliation for complaining of sex discrimination.[314]

Additionally, the motion was denied as to the defamation action alleged against an individual defendant, who allegedly in a single publication to a professional colleague of the plaintiff, intimated that the plaintiff was a lesbian. In conclusion, the court granted the defendant's motion for a new trial or remititur, only as to damages on the two sex discrimination claims of the District of Columbia statute and Title IX, or accepting a reduction to $250,000; and on the defamation claim a reduction from $54,000 to $10,000. Thereafter, the parties settled the case during November 1995.

C. *Termination*

1. Cases Commenced Pre-1994

On January 6, 1994, the Ninth Circuit in *Stanley v. University of Southern California*[315] affirmed the district court's denial of the plaintiff's motion for a preliminary injunction seeking restoration of the plaintiff's position as the women's basketball coach at the University *pendente lite*. Marianne Stanley had commenced her lawsuit in 1993 seeking $8 million in compensatory and punitive damages on a number of legal theories, including: Title IX, the Equal Pay Act,[316] the *California Constitution*, breach of contract, and wrongful discharge.

The appellate court found the men's basketball coach had "substantially" different responsibilities in raising revenue (the men's basketball program generated 90% revenues compared to the women's basketball program which generated 10%) and public relations responsibilities on behalf of the University that could command a greater salary than

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314. *Id.* at 5.

315. 13 F.3d 1313 (9th Cir. 1994) (granting the defendants' motion for summary judgment). An appeal has been taken to the Ninth Circuit. Prior to this decision, there was only one other decision concerning athletic employment pursuant to Title IX, *O'Connor v. Peru State College*, 781 F.2d 632 (8th Cir. 1986), which did not reach the merits of the case, but focused on the threshold issue of whether the athletic department was a recipient of federal funds to ensure Title IX protection.

316. *See* Mike Candal, *Equal Coaching for Unequal Pay*, NEWSDAY, Apr. 2, 1995, (Sports section), at 18 (concerning the difference in salary paid to the men's and women's basketball coaches at the University of Connecticut). The male head coach of the women's team guided his team to the 1994–95 NCAA Women's Basketball championship. *See also* Ira Berkow, *Auriemma Helps Pave the Way at UConn*, N.Y. TIMES, Apr. 2, 1995, § 8, at 2.

provided to the women's basketball coach pursuant to the Equal Pay Act. The Ninth Circuit found that "[e]mployers may reward professional experience . . . without violating the EPA."[317] Furthermore, "[r]evenue generation is an important factor that may be considered in justifying greater pay. We are also of the view that the relative amount of revenue generated should be considered in determining whether responsibilities and working conditions are substantially equal."[318]

Interestingly, the only reference to Title IX was contained in a footnote, where the Ninth Circuit stated, "Coach Stanley has not contended either in the district court or before this court that this evidence [concerning the revenue-generating ability of the men's versus women's basketball programs] would support an inference that USC violated Title IX."[319] Furthermore, the mere fact that the University ultimately offered only a one-year contract did not establish retaliation[320] where the men's basketball coach had a multi-year contract, and Stanley's expired contract was a multi-year contract. In both the Ninth Circuit decision and the following district court decision, Title IX is essentially left out of the equation in determining whether sex discrimination existed.

On March 10, 1995, the district court granted the defendant's motion for summary judgment in its entirety, primarily on the determination that the duties and responsibilities of the men's basketball coach were greater than those required of the women's basketball coach, with the former position requiring greater pressure to win, raise revenue, and satisfy greater public relations requirements.[321] The district court found that

317. *Stanley*, 13 F.3d at 1322 (citing Soto v. Adams Elevator Equip. Co., 941 F.2d 543, 548 n.7 (7th Cir. 1991)).

318. *Id.* at 1323. See Naughton & Srisavasdr, *supra* note 6, at A45, referring to a recent NCAA report that revealed that "more than 60 percent of Division I men's basketball programs and Division I-A football programs lose money. The average deficits are $226,000 and $1.02 million respectively." *Id. See also* Jim Naughton, *A Book on the Economics of College Sports Says Few Programs are Financially Successful*, CHRON. HIGHER EDUC., Oct. 11, 1996, at A57.

319. *Stanley*, 13 F.3d at 1323 n.3 (citations omitted). *Cf.* Heckman, *supra* note 15, at 1007–08.

320. 34 C.F.R. § 106.71 (adopting by incorporation 34 C.F.R. § 100.7(e)) (prohibiting retaliation).

321. Stanley v. University of S. Cal., No. CV93-4708 (C.D. Cal. Mar. 10, 1995) [hereinafter Slip. Op.]. *See* Jane Gottesman, *An Odyssey of Championships and Hardships*, N.Y. TIMES, Nov. 19, 1995, § 8, at 11 (concerning Coach Stanley). Cheryl Miller, who was hired as Stanley's replacement, submitted her resignation during September 1995 to pursue television opportunities and more recently has become involved with the Women's National Basketball Association. Stanley was hired during April 1996 as the head women's basketball

> Stanley still is unable to show the existence of a genuine issue of material fact on the issue of whether the men's and women's basketball coaching positions are substantially equal and require equal pay under the law. It is clear they are not. Both the men's and women's head coaches recruit student athletes, coach basketball, provide academic guidance to team members, and supervise their coaching staffs. The men's coach, however, is under considerable pressure to generate revenue for the university by attracting paying spectators and producing a winning team.[322]

The court noted that "[t]his pressure is created by the media, public, and the school's administration and donors."[323]

The court grouped the sex discrimination claims pursuant to the Equal Pay Act, Title IX, and the California statute[324] in one discussion. A review indicated that as with the prior appellate court decision, the focus was on an explicit analysis of the Equal Pay Act. "To state a claim under this section, the plaintiff's job must require substantially the same skill, effort, and responsibility as the higher compensated job held by a member of the opposite sex."[325] The only direct mentions of Title IX were in the next to last paragraph of the subsection, where as an aside the district court stated that "[s]imilarly, Title IX of the [Education Amendments] of 1972 prohibits an educational program that receives federal financial assistance from denying benefits to, or subjecting to discrimination, any person on the basis of sex,"[326] and "[the athletic director's] power as athletic director to hire and fire athletic coaches does not make him an employer for purposes of individual liability under . . . Title IX."[327] Once again, there was no discussion of any of the Title IX regulations. First, there was absolutely no mention of the Title IX regulations governing employment. Second, there was no recognition of the Title IX regulation establishing "equal opportunity" which

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coach at University of California at Berkeley, after serving as temporary head coach at Stanford University. Stanley will be paid a base salary comparable to that of the men's basketball coach. *Cf.* University of California, *Gender Equity in Intercollegiate Athletics at the University of California: A Report of the Gender Equity Committee of the Department of Intercollegiate Athletics & Recreational Sports*, Dec. 1, 1993 (on file with the *Nova Law Review*).

322. Slip Op. at 14, *Stanley*, (No. CV93-4708).

323. *Id.* at 15.

324. Fair Employment & Housing Act, CAL. GOVT. CODE §§ 12940–12950 (West Supp. 1993).

325. Slip Op. at 12–13, *Stanley* (No. CV93-4708).

326. *Id.* at 13.

327. *Id.* at 19.

explicitly mandates equal opportunity in coaching for male and female athletes when a school elects to provide separate teams for their male and female student athletes. The court underscores that the women's basketball coach was

> not required to make any specific number of public appearances to promote the women's basketball team .... The University did not impose public relations responsibilities on her while she was head coach .... In contrast, [the men's basketball coach's] required participation in at least twelve outside speaking engagements per year, that he be accessible to the media for interviews, and that he participate in community activities. He was required to participate in fund-raising activities benefiting the athletic department in general and the men's basketball program in particular.[328]

The court fails to recognize that generally it is the recipient of federal funds, the academic institution, which is clearly controlling the issue of public relations responsibilities, by explicitly imposing it as a requirement within a contract of the men's basketball coach and not the contract of the women's basketball coach, and then is permitted to use the absence thereof to penalize the women's basketball coach when it comes to remuneration. As previously identified, surely a women's coach would not be against such minimal additional public relations duties, with a possible additional compensation of $60,000 per annum. The logic certainly seems flawed. Moreover, query whether it triggers a direct attack as to whether the recipient of federal funds was providing "equal opportunity" for its female student athletes, where the school, adopting the court's rationale, was apparently not required to promote this program with the same vigor.

Additionally, the court places significant stock in the revenue-generating responsibilities of the men's coach. "Revenue generation is an important factor in determining whether responsibilities and working conditions are substantially equal and whether greater compensation is justified."[329] Not surprisingly, the men's basketball program raised $4,621,020.90 versus only $59,918.50 by the women's basketball program. The court neglects to provide the dates when the men's and women's basketball teams came into existence at the University. The court does compare the spectators for the appropriate periods for the men's and women's basketball teams. Not surprisingly, the statistics favored the men;

328. *Id.* at 16.
329. *Id.* (citations omitted).

however, the men's team averaged merely 4103 spectators for the time period in question, hardly an overwhelming number for a major college basketball program.[330] Of course, the argument can be made, that if the judiciary is going to do a side-by-side comparison, then by necessity the University must provide an "equal opportunity" for both programs, and so the court would be required to insure that that standard was satisfied, before the comparison can be made. This determination, resting as it does on the Ninth Circuit decision, obscures the Title IX picture. As previously identified, revenue-generation is absent from the "equal opportunity" discussion. Furthermore, the "[c]ourt addresses the retaliation claim as if it arises under Title VII."[331] Again, what about retaliation pursuant to Title IX?

Instead, the court reiterated that "[t]he [c]ourt finds no discrimination arising from USC's contract offers to Stanley. It thus was not required to pay her a salary equal to that paid to the men's head coach."[332] The appellee's brief recounted the Ninth Circuit's observation that "the *uncontradicted evidence* shows that Coach Raveling's responsibilities, as head coach of the men's basketball team, differed substantially from the duties imposed upon Coach Stanley."[333] Coach Raveling has since retired. It is not known what compensation arrangement exists with the current men's basketball coach. Oral argument before the Ninth Circuit occurred on October 7, 1996.[334]

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330. The Appellee's Brief, in discussing one of plaintiff's experts' arguments, notes that "[w]hat Frey appears to be saying, although he cites no source for his statement, is that, compared with other men's programs, USC's men's program did not have relatively high attendance; conversely, compared with other women's programs, the USC women's program did have relatively high attendance." Stanley v. University of S. Cal., No. 95-55466, Appellee's Brief, Aug. 25, 1995, at 21 n.17.

331. Slip Op. at 20, *Stanley* (No. CV93-4708).

332. *Id.* at 14.

333. Appellee's Brief, Stanley v. University of S. Cal., No. 95-55466, Aug. 25, 1995, at 2 (on file with the *Nova Law Review*). The brief also summarizes that as to the retaliation/public policy wrongful discharge claims that "[t]he court found it was undisputed that USC had offered Stanley a multi-year contract with very substantial pay increases *after* she had demanded the same pay as Raveling. . . . Furthermore, Stanley was not terminated, but her written employment contract expired June 30, 1993, and she rejected all offers USC made for a new contract." *Id.* at 7. Furthermore, defendants argued, "Under the law set by this Court in *Stanley I*, USC was not required to pay Stanley according to a marketing professor's view of the *potential* of women's basketball, as distinguished from the underlying *actuality* of spectator interest, media interest, revenue generation, and the like." *Id.* at 19–20.

334. The Ninth Circuit posed no direct questions about any of the specific Title IX regulations governing employment. The plaintiff has also filed two other appeals in this case, one challenging the alleged bias of the district court judge, No. 95-56250 (9th Cir. 1996) (briefs have been filed), and another challenging the imposition of costs as of result of the summary

Katalin Deli, the former head coach of women's gymnastics team, alleged sex discrimination in violation of Title IX, Title VII, and the Equal Pay Act in not having received pay comparable to that of the men's football, basketball, and ice hockey coaches (but not the men's gymnastics coach) in *Katalin Deli v. University of Minnesota.*[335] The federal district court granted the University's motion for summary judgment on all three federal statutes.[336] The Title IX claim was dismissed for failure to comply with the statute of limitations. No appeal was taken.[337]

Gabor Deli, the former assistant women's gymnastics coach, also commenced a federal lawsuit in *Gabor Deli v. University of Minnesota,*[338] alleging discrimination, including sex discrimination in violation of Title IX in not receiving pay comparable to that paid to assistant coaches of some men's teams (other than his own sport). On August 18, 1994, the federal district court granted the University's motion for summary judgment. First, as to the Title VII assertion, the court concluded that "[t]he clear terms of the statute prohibit discrimination in compensation based on the sex of the *recipient.* The statute does not proscribe salary discrimination based on the sex of other persons over whom the employee has supervision or oversight responsibilities."[339] Second, the court rejected plaintiff's Equal Pay Act contention based on the failure to compensate him at the same level as male assistant coaches of certain men's intercollegiate teams. The court stressed that under this statute, the crux must be a difference in what is paid members of one sex compared to the opposite sex. Since the plaintiff here is a man and the comparators (assistant coaches of the selected men's teams) are also all male, this claim cannot advance. Moreover, the court would not entertain such a claim based on the sex of the students coached.[340] "Such compensation differentials are based on a 'factor other than sex' and thus are not

judgment awarded, No. 96-55004 (9th Cir. 1996). The Ninth Circuit denied the plaintiff's petition for a writ of mandamus seeking to have a district court judge disqualified, No. 95-70704 (9th Cir. 1996).

335. 863 F. Supp. 958 (D. Minn. 1994).

336. *Id.* at 963.

337. *See also* Deli v. Hasselmo, 542 N.W.2d 649 (Minn. Ct. App. 1996); Deli v. University of Minn., 511 N.W.2d 46 (Minn. Ct. App. 1994).

338. No. 3-93-501 (D. Minn. Aug. 18, 1994) (Memorandum and Order) (on file with the *Nova Law Review*) [hereinafter Mem. & Order].

339. Mem. & Order, at 11, *Deli,* (No. 3-93-501) (emphasis added) (citing Jackson v. Armstrong Sch. Dist., 430 F. Supp. 1050, 1052 (W.D. Pa. 1977)).

340. Mem. & Order, at 12–13, *Deli,* (No. 3-93-501) (citing EEOC v. Madison Comm. Unit Sch. Dist. No. 12, 818 F.2d 577, 581, 584 (7th Cir. 1987)).

proscribed by the EPA."[341] Third, as to the Title IX violation raised, the court ruled the plaintiff did not have standing to pursue a Title IX claim on behalf of student athletes he had coached, and assuming arguendo that he had, such standing evaporated when his coaching position was terminated, thus rendering any such standing moot.[342] Moreover, the court eviscerated the Title IX claim by addressing merely the "equal opportunity" regulations which require equivalency as to coaching.[343] The rationale was based, in part, on the failure of the plaintiff to assert in his complaint that the athletes he coached received lesser quality coaching as a result of the difference between his salary and the salary paid to the men's assistant coaches. In *Deli v. University of Minnesota*,[344] the state Court of Appeals ruled that the dismissals of the assistant coach, Gabor Deli, and the head women's gymnastics coach, Katalin Deli (Gabor Deli's wife), were predicated upon just cause.[345]

During December 1995, the jury issued a verdict in favor of the plaintiffs, former coaches, and athletic administrator employees in *Meadows v. State University of New York at Oswego*.[346] However, during February 1996, the judge overturned it. Subsequently, motions were filed seeking restoration of the verdict. The case was ultimately settled during 1996.[347]

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341. Mem. & Order, at 14, *Deli*, (No. 3-93-501).

342. Mem. & Order, at 14 n.4, *Deli*, (No. 3-93-501). The regulations allow anyone to file an administrative complaint on behalf of aggrieved beneficiaries of Title IX protection, and such an administrative complaint may even be filed confidentially. 34 C.F.R. § 100.7 (1996).

343. Mem. & Order, at 15, *Deli*, (No. 3-93-501) (referring to 34 C.F.R. § 106.41(c)). Specifically subsections 5 ("Opportunity to receive coaching and academic tutoring") and 6 ("Assignment and compensation of coaches and tutors") pertain to coaching.

344. 511 N.W.2d 46 (Minn. Ct. App. 1994).

345. *Id.* at 54.

346. No. 92-CV-1492FJS (N.D.N.Y. Oct. 4, 1993) (denying plaintiffs' motion for a preliminary injunction) (complaint filed during Nov. 1992).

347. For other cases commenced prior to 1994, see Huffman v. Gordon, No. 701610 (Cal. Super. Ct. Orange County 1992) (parties settled suit brought by terminated women's volleyball coach at California State University at Fullerton); Suwara v. Day, No. 659577 (Cal. Super. Ct. San Diego 1992) (parties settled suit brought by former women's volleyball coach at San Diego State University, who was terminated); California Nat'l Org. for Women v. Evans, No. 728548 (Cal. Super. Ct. Santa Clara 1993) (parties settled suit brought by former associate athletic director of San Jose State University); Dowell v. College of Mt. St. Joseph, No. C-1-93-0826 (S.D. Ohio) (settled) (discussed in Heckman, *supra* note 15, at 1014, 1017).

2. Cases Commenced During 1994–96

On January 20, 1994, Marty Hawkins, the former coach of the women's basketball team filed suit in *Hawkins v. University of Loyola at Chicago*,[348] seeking compensatory damages of $1 million and punitive damages of $3 million for his firing which he alleged was predicated on his speaking out for gender equity at the school in violation of Title IX. The federal complaint was voluntarily withdrawn. Thereafter, a lawsuit was commenced in state court.[349]

On April 6, 1994, a former women's basketball coach filed a complaint in *Bowers v. University of Baylor*,[350] alleging sex discrimination and retaliation in violation of Title IX. The plaintiff sought $1 million compensatory damages and $3 million punitive damages, and injunctive and declaratory relief. Thereafter, on April 13, 1994, the district court denied plaintiff's motion for a preliminary injunction restoring her to the head coaching position of women's basketball during the pendency of the lawsuit.[351] On August 11, 1994, the district court denied the defendant University's motion to dismiss the plaintiff's Title IX claim, holding that an employee may assert a private right of action under this statute.[352] However, it granted the motion as to the individually named defendants,[353] relying principally on *Doe v. Petaluma City School District*.[354]

During April 1994, Mary Jane Telford, former women's basketball coach for seventeen seasons brought suit in *Telford v. St. Bonaventure University* alleging sex discrimination pursuant to Title IX, Title VII, and the Equal Pay Act. On April 28, 1995, the case was settled, reportedly for at least $100,000.[355]

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348. No. 94CV00245 (N.D. Ill. 1994) (On Mar. 22, 1994, the case was dismissed without prejudice.).

349. *Hawkins*, No. 94L03300 (Cook County, Ill. Mar. 18, 1994) (The case was pending as of January 24, 1997, and is subject to nonbinding mediation. The parties have selected a mediator and are arranging a date for mediation.).

350. No. A94-CA-239JN (W.D. Tex. Apr. 6, 1994).

351. *Id.* (W.D. Tex. Apr. 13, 1994).

352. Bowers v. Baylor Univ., 862 F. Supp. 142, 145 (W.D. Tex. 1994).

353. *Id.* at 146.

354. 830 F. Supp. 1560 (N.D. Cal. 1993). In this case alleging sexual harassment of a female student by her peers in creating a hostile environment, the district court determined that "it is the educational institution that must be sued for violation of Title IX." *Id.* at 1577. *Accord* R.L.R. v. Prague Pub. Sch. Dist. I-103, 838 F. Supp. 1526, 1530 (W.D. Okla. 1993) (dismissing the action against the alleged coach charged with the actual sexual abuse).

355. *Arena*, NEWSDAY, July 15, 1995, at A27.

On May 11, 1994, Ellyn Bartges, a former part-time assistant women's basketball coach and women's softball coach, who was terminated during June 1993, filed an amended complaint seeking $5 million damages and injunctive relief in *Bartges v. University of North Carolina at Charlotte*,[356] pursuant to Title IX, Title VII, and Equal Pay Act, based on allegations of sex discrimination, constructive discharge, and retaliation.[357] Bartges had resigned from her position as women's head softball coach. On November 6, 1995, the federal district court granted the University's motion for summary judgment as to all causes of action alleged by the plaintiff.[358] The decision in *Bartges* focused on the Equal Pay Act considerations, as opposed to Title IX, similar to the Ninth Circuit decision in the *Stanley* case.

Bartges had volunteered to be an assistant coach for the women's basketball team during 1988–89.[359] She was then paid an hourly rate for the following season, and hired by the female athletic director, Judith Rose, as the part-time head women's softball coach during the summer of 1990–91. Rose paid Bartges more than she had paid the former women's softball coach, a man, despite her having less experience. Bartges has no prior head coaching experience on the collegiate level, six months of experience as a volunteer assistant basketball coach at another university, six months of experience as head coach of a high school girl's team, and no prior experience as a softball coach. Bartges continued as part-time assistant women's basketball coach and part-time head softball coach for the University for the academic years 1990–91, 1991–92, and 1992–93.[360]

"Later, Bartges lost her job as Assistant Women's Basketball Coach when that position was converted to a full-time position and she was not hired for the full-time slot."[361] She applied for the women's assistant basketball coach's position "only after she was invited to do so" by the athletic director and current coach.[362] Although she was one of the three finalists, she was not selected. Instead, the University chose another woman who had three years head coaching collegiate experience elsewhere and was a former basketball player at the University. In order to comply with NCAA

356. 908 F. Supp. 1312 (W.D.N.C. 1995), *aff'd*, 94 F.3d 641 (4th Cir. 1996). On April 4, 1994, she had filed her original complaint. She did not resign from her position as part-time head softball coach until July 26, 1994.

357. *Id.* at 1320.

358. *Id.* at 1334.

359. *Id.* at 1317.

360. *Id.* at 1318.

361. *Bartges*, 908 F. Supp. at 1319.

362. *Id.*

regulations, the University created positions for two full-time assistant coaches and one part-time "restricted earnings" coach,[363] who was limited to $12,000 a year in total compensation from the University.[364]

Bartges agreed to change the term of her employment as softball coach from a twelve-month to nine-month position to retain her health insurance coverage. During her employment, she filed two administrative complaints with the Equal Employment Opportunity Commission ("EEOC"). Bartges also filed an administrative claim with the OCR alleging sex discrimination pursuant to Title IX. She submitted her letter of resignation on July 26, 1994.[365]

The court declined the Equal Pay Act claim that Bartges received lower pay than other coaches.[366] The court observed that the full-time head baseball coach "is responsible for a thirty-two member team as opposed to the fifteen member softball team. Therefore, the Head Baseball Coach must recruit, monitor, and coach more than twice as many student-athletes . . . [and] is also responsible for supervising one full-time coach."[367] The court found the same situation existed with the head volleyball coach, which was also a full-time position.[368] Moreover, Bartges was paid more than the head golf coach. A comparison with the men's assistant coaches illustrated the plaintiff's prior limited coaching experience in basketball and non-existent prior experience with softball, compared to the corresponding assistant coaches.[369] Additionally, the men's assistant basketball coaches were full-time positions, compared to position of the women's assistant basketball coach, which was only a part-time position.

The court highlighted that

> the uncontested evidence is that men's basketball is the most marketable and largest revenue producing sport at UNCC. This makes the position considerably more important to the University, and

363. The court did not discuss the pending litigation concerning the permissibility of the "restricted earnings" coaches. *See, e.g.*, Law v. NCAA, 902 F. Supp. 1394 (D. Kan. 1995) (men's "restricted earnings" basketball coaches instituted an antitrust action against the NCAA); Schreiber v. NCAA, 167 F.R.D. 169 (D. Kan. 1996) (concerning whether class action status would be conferred upon members of NCAA men's "restricted earnings" baseball coaches, who instituted an antitrust action against the NCAA).

364. *Bartges*, 908 F. Supp. at 1319 n.1.

365. *Id.* at 1320.

366. *Id.* at 1326.

367. *Id.* at 1323.

368. *Id.* at 1325.

369. *Bartges*, 908 F. Supp. at 1325.

> also means the position entails greater public relations, recruiting and other coaching responsibilities, and means the position carries with it much more pressure to produce winning teams.[370]

In addition, "[t]he University has given several reasons why Bartges was paid less than the coaches of other programs: her limited experience, the relative importance of the sport she coached in the University's sports program, and the prevailing wage for coaches in her sport."[371] Thus, the court concluded that "[b]ecause UNCC has established that its compensation decisions were based on a factor other than sex . . . , the University is entitled to summary judgment on Bartges' claim under the Equal Pay Act."[372]

In regard to Title IX, the University argued that the legislative history was not intended to provide a private cause of action for individual educational employees, who were relegated to Title VII. This was based primarily on the assertion that Congress has amended Title VII to include educational employees, within the Equal Employment Opportunity Act of 1972, merely three months prior to the enactment of Title IX and thus, the "legislative history of the Equal Employment Opportunity Act of 1972, which amended Title VII," is part of the legislative history of Title IX.[373] Thus, the defendant argued that Congress omitted any intention of including a private rights of action for educational employees because it had already been addressed.[374] While that is accurate, can it be interpreted that any omission in a new statute enacted three months later is the tabula rasa? Moreover, the argument ignores the fact that in 1975 Congress enacted specific Title IX regulations solely for educational employees. If Title VII was the exclusive remedy then such regulations would have been superfluous, or Congress could have instead merely incorporated by reference the actual Title VII requirements, as it did for example when referring to retaliation, when it adopted Title VI. However, this was not done. The defendant continued that, assuming arguendo, Title IX did allow for such a private cause of

370. *Id.* at 1323 (citing Jacobs v. College of William and Mary, 517 F. Supp. 791, 795–98 (E.D. Va. 1980), *aff'd*, 661 F.2d 922 (4th Cir. 1981); Stanley v. University of S. Cal., 13 F.3d 1313, 1321–24 (9th Cir. 1994); Deli v. University of Minn., 863 F. Supp. 958, 961 (D. Minn. 1994)).

371. *Bartges*, 908 F. Supp. at 1324.

372. *Id.* at 1326.

373. Wilson v. University of Va., 663 F. Supp. 1089, 1091 (W.D. Va. 1987).

374. Defendant University's Memorandum in Support of Motion for Summary Judgment, May 15, 1995, at 48, Wilson v. University of Va., 663 F. Supp. 1089 (W.D. Va. 1987).

action,[375] the Title VII standard of intentional discrimination must be established. Since no evidence of intentional discrimination was found, no Title IX cause of action could be maintained.

From a Title IX perspective, assuming arguendo a Title IX private right of action for educational employees, the issue should have been framed as whether the University discriminated on the basis of sex, when: a) comparing the full-time head coaching position for men's baseball vis-a-vis the part-time head coaching position for the women's softball team; b) comparing the full-time men's assistant basketball coaches vis-a-vis the part time women's assistant basketball coach;[376] and c) whether an examination of the entire men's athletic program vis-a-vis the entire women's athletic program revealed sex discrimination in the assignment, compensation, and opportunity to receive coaching.[377] The court eschewed such an analysis. On August 14, 1996, the Fourth Circuit affirmed the lower court's decision for the reasons advanced therein.[378] No appeal was filed seeking certiorari with the Supreme Court.

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375. The Fourth Circuit sanctioned such a position in *Preston v. Virginia ex rel. New river Community College*, 31 F.3d 203 (4th Cir. 1994) (discussed *infra* p. 615).

376. The University asserted that "UNC Charlotte does not pay the coaches in the basketball program more because they coach men." Appellees' Brief, 1996, at 22 n.3, Bartges v. University of N.C. at Charlotte, No. 95-3157 (4th Cir. Dec. 18, 1995).

377. Subsequently, the OCR found no violation in the assignment or compensation of coaches, but did find a violation in the availability of coaches for women's teams. Appellees' Brief, at 48. Even in the appellees' brief, the University extolled that

> [o]ne significant factor is the priority UNC Charlotte places on the sport in question. . . . In prioritizing the sports in which it offers intercollegiate competition, UNC Charlotte has simply decided which sports, and consequently which coaches, are most important to the university. In light of those facts, UNC Charlotte's decision to pay the more important coaches more money is a legitimate, nondiscriminatory reason for the difference between their salaries and the plaintiff's.

Appellees' Brief, at 17–18. High priority sports were men's basketball, men's baseball, men's golf, and women's volleyball. Noticeably absent was women's basketball from the school's internal assessment. *See* Heckman 1992 commentary, *supra* note 15, at 970, warning against the practice of school's "emphasizing" certain sports for a Title IX analysis. The court made no reference to the inequity in the number of participation opportunities (and teams) emphasized for male student athletes at this University, compared to the female student athletes.

378. 94 F.3d 641 (4th Cir. 1996). The University's appellate brief stated that "[t]hough Bartges may believe the she worked as hard as a full-time head coach, her belief is immaterial. She has presented no evidence that the UNC Charlotte required the same effort from its part-time head coaches that it did from its full-time head coaches. It is only when the employer

In *Plotzke v. Boston College*,[379] the former coach of the women's basketball team at the college commenced a federal lawsuit alleging, *inter alia*, Title IX sex discrimination and retaliation during November 1994. On March 27, 1995, the court granted Boston College's motion to dismiss the plaintiff's complaint in part, and denied it in part.[380] The Title IX claim remained, with the court relying on *Lipsett v. University of Puerto Rico*.[381] Likewise, the motion of the individually named University President and athletic director was granted in part, and denied in part.[382] The Title IX claim was also allowed against the two aforementioned individual defendants, again citing *Lipsett*.[383] This stance of retaining the individually named defendants is at odds with the decisions in other cases, which have dismissed such claims. The parties entered into a confidential settlement during 1996.

In *Harker v. Utica College of Syracuse University*,[384] the women's basketball coach's contract was not renewed, and she brought suit pursuant to Title VII, Title IX, and the Equal Pay Act. On April 24, 1995, the court dismissed her complaint on all theories, finding, *inter alia*, that she failed to create an inference of discrimination under Title IX.[385]

Only one case dealt with termination of a female athletic employee of a men's team. On July 18, 1995, JoAnn Hauser, former men's basketball teams' athletics trainer at the University of Kentucky, filed a state court action in *Hauser v. University of Kentucky*,[386] alleging sex discrimination concerning her discharge. No Title IX claim was alleged. During September 1996, the judge dismissed the causes of action directed at the athletic director and men's basketball coach, in their individual capacities, in this lawsuit seeking $2 million.

D. *Retaliation*

Most of the termination cases also contained retaliation aspects. Stephanie Schleuder, the women's volleyball coach at the University of

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requires the same effort or responsibility for two positions that the jobs are substantially equal." Appellees' Brief, at 12.

379. No. 94-12329-EH (D. Mass. Nov. 1994) (defendants' Motion for Dismissal was granted in part and denied in part during 1995).

380. *Plotzke*, No. 94-12329-EH (D. Mass. Mar. 27, 1995).

381. 864 F.2d 881 (1st Cir. 1988).

382. *Id.* at 884.

383. *Id.*

384. 885 F. Supp. 378 (N.D.N.Y. 1995).

385. *Id.* at 392.

386. No. 95-2252 (Cir. Ct., Fayette Cty., Ky. July 18, 1995) (on file with clerk of court). *See Governmental Affairs Report*, NCAA NEWS, Aug. 30, 1995, at 5.

Minnesota for thirteen seasons, had been without a contract since 1993. She was fired during December 1994. "She alleges the firing was due to her crusading for pay equity in the women's athletic department."[387] She originally brought suit in a federal district court claiming violations of Title IX and the Equal Pay Act. After her motion for temporary restraining order restoring her as coach was denied, she voluntarily dismissed the suit[388] and filed a claim with the state agency responsible for sex discrimination. On January 30, 1995, a state court judge in *Minnesota v. Regents*,[389] issued an injunction preventing the University of Minnesota from hiring a new women's volleyball coach while the Minnesota Department of Human Rights investigated a claim of retaliation pursuant to the Minnesota Human Rights Act. The Commissioner of the agency asserted that the state predicate was broader than the federal one.

The case of *Clay v. Board of Trustees of Neosho Community College*,[390] concerned allegations of retaliation by the male coach of the women's basketball team, whose contract of employment was not renewed.[391] He had spoken about the lack of Title IX compliance with the male athletic director. The district court noted that "[t]he question of whether Title IX provides a private cause of action for damages for retaliation against a whistle blower, under circumstances similar to the instant case, has not been decided by the Supreme Court or the Tenth Circuit."[392] The court found that "[i]n short, discrimination against women by a community college in its sports programming is a matter of public interest."[393] The district court found that a plaintiff may maintain a Title IX claim for retaliation.[394] Furthermore, the common law wrongful discharge claim would be preempted by Title IX.[395]

387. *Arena*, NEWSDAY, Feb. 3, 1995, at A65.

388. *Governmental Affairs Report*, NCAA NEWS, Apr. 26, 1995, at 1.

389. No. EM94-289 (Minn. Dist. Ct. Jan. 30, 1995)

390. 905 F. Supp. 1488 (D. Kan. 1995).

391. *Id.* at 1491–93.

392. *Id.* at 1494.

393. *Id.* at 1498.

394. *Id.* at 1495. The court also held that "Title IX actions may only be brought against an educational institution, not an individual acting as an administrator or employee for the institution." *Clay*, 905 F. Supp. at 1495.

395. *Id.* at 1501.

E. *Reverse Discrimination Cases*

The first reverse discrimination case was commenced during February 1995 in *Reinhart v. Georgia State University*.[396] Bob Reinhart, former men's basketball coach at the University commenced the suit, "claiming he was fired because he refused a pay cut intended to bring his salary in line with that of the women's basketball coach."[397]

VI. EDUCATIONAL EMPLOYMENT TERMINATION OR RETALIATION GENERALLY

The predominant issue evidenced herein is a threshold issue of whether Title IX provides a private cause of action for employees of educational institutions, or are they limited to a Title VII action, with any prosecution of violations of Title IX involving educational employees confined to the federal government by the Department of Justice or the OCR. On June 13, 1994, an University of Toledo female employee brought an action against the University for sex and age discrimination in *Wedding v. University of Toledo*.[398] The district court held that no private cause of action existed under Title IX for sex discrimination in employment.[399]

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396. *Sidelines*, CHRON. HIGHER EDUC., Feb. 10, 1995, at A35.

397. *Id.*

398. 862 F. Supp. 201 (N.D. Ohio 1994), *overruled by* Ivan v. Kent State Univ., 92 F.3d 1185 (6th Cir. 1996).

399. *Id.* at 203. *Accord* Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995) (Title IX did not confer a private cause of action to a female medical professor denied tenure), *cert. denied sub nom.* Lakoski v. University of Tex., Med. Branch at Galveston, 117 S. Ct. 357 (1996). *But see* Preston v. Virginia *ex rel.* New River Comm. College, 31 F.3d 203 (4th Cir. 1994); Bowers v. Baylor Univ., 862 F. Supp. 142 (W.D. Tex. 1994) (see discussion *supra* p. 607); Ward v. Johns Hopkins Univ., 861 F. Supp. 367 (D. Md. 1994); Henschke v. New York Hospital-Cornell Med. Ctr., 821 F. Supp. 166 (S.D.N.Y. 1993); Paddio v. Board of Trustees for State Colleges & Univs., 61 Fair Empl. Prac. Cas. (BNA) 86 (E.D. La. 1993) (wherein the district court disregarded the argument of Southeastern Louisiana University that Title IX did not provide relief for sex discrimination alleged by the former women's volleyball and softball coach). Several cases have discussed Title IX causes of action in educational employment cases involving athletic employment at educational institutions. *See* Stanley v. University of S. Cal., 13 F.3d 1313 (9th Cir. 1994) (discussed *supra* p. 600); Deli v. University of Minn., 863 F. Supp. 958 (D. Minn. 1994) (discussed *supra* p. 605); Deli v. University of Minn., No. 3-93-501 (D. Minn. Aug. 18, 1994) (discussed *supra* p. 605). Based on the Supreme Court decision in *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) (allowing a Title IX private right of action implied for a student), *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (upholding the constitutionality of the Title IX educational regulations in a case brought by the federal government against a school district, as opposed to a plaintiff who was

The plaintiff, a community college student support services counselor, alleged Title IX and Title VII retaliation in *Preston v. Virginia ex rel New River Community College*[400] when she was not elevated to the activities counselor position. She had filed an employment discrimination claim when she was the support services counselor.[401] On August 3, 1994, the Fourth Circuit affirmed the district court's dismissal of her claim.[402] The appellate court recognized that a Title IX implied private right of action extends to employment discrimination at educational institutions receiving federal funds.[403] However, prior to passage of the Civil Rights Act of 1991,[404] the prevailing case law involving Title VII retaliation was "that an employer is not liable if it would have reached the same employment decision 'in the absence of the protected conduct.'"[405] In 1994, the Supreme Court held the Civil Rights Act should not be retroactively applied.[406] Thus, the Fourth Circuit determined that "Title VII principles should be applied to Title IX actions, as least insofar as those actions raise employment discrimination claims."[407] Therefore, since the actions complained of occurred prior to the effective date of the Civil Rights Act, the Title VII standard would be applied and retaliation would not be found where the protected activity "played a part—even a substantial part—in the decision-making process."[408]

In *Fairbairn v. Board of Education of South Country Central School District*,[409] the plaintiff, a female school administrator, was terminated.[410] She brought a claim under a number of legal theories, including Title IX. On January 13, 1995, the district court ruled:

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an educational employee) (Title IX should be afforded "a sweep as broad as its language,"), and explicit Title IX regulations dealing with employment, namely 34 C.F.R. §§ 106.51, .52, .54, the decisions finding a Title IX right of action for educational employees would seem to be the more supportable approach.

400. 31 F.3d 203 (4th Cir. 1994).

401. *Id.* at 204–05.

402. *Id.* at 209.

403. *Id.* at 206.

404. 42 U.S.C. § 1981(a) (1994).

405. *Preston*, 31 F.3d at 206.

406. *Id.* at 207.

407. *Id.* at 206. *See* Roberts v. Colorado St. Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888, 902 (1st Cir. 1993); Lipsett v. University of P.R., 864 F.2d 881, 869–97 (1st Cir. 1988); O'Connor v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986).

408. *Preston*, 31 F.3d at 206.

409. 876 F. Supp. 432 (E.D.N.Y. 1995).

410. *Id.* at 435.

> The burdens of proof and production which govern disparate treatment claims under Title VII . . . , likewise are applicable to . . . Title IX. . . . Accordingly, Fairbairn initially was required to establish a prima facie case of discrimination that (1) she belonged to a protected class, (2) she applied and was qualified for a job for which her employer sought applicants, (3) that despite her qualifications, she was rejected, and (4) that after rejection, the post remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.[411]

A female plaintiff brought a lawsuit against the Board and some individuals in *Howard v. Board of Education of Sycamore Community Unit School District No. 427*[412] on a number of legal theories premised on her allegations of constructive discharge and being replaced with a man who was not minimally qualified.[413] The Title IX claim was directed only against the Board concerning claims of sexual discrimination, harassment, and retaliation.[414] The district court cited the definition of "program or activity" and determined that such definition does not include the agents of such an entity. The court recognized:

> Several other cases, on the other hand, have applied the agency principles under Title VII cases to sexual harassment actions under Title IX. . . . This court is persuaded by the reasoning in *Floyd*. While it is not entirely clear what the precise parameters are on employer liability, it is at least evident that agency principles provide guidance in Title VII cases.[415]

"Absent the use of traditional agency principles, the court is left with two alternatives: strict liability based on the conduct of school employees or liability premised only upon the direct knowledge or involvement of the school or educational institution."[416] The court opined:

> Absent knowledge or direct involvement by the school or educational agency, it is difficult to characterize any form of sex discrimination as an authorized program or activity of the school edu-

411. *Id.* at 437.
412. 876 F. Supp. 959 (N.D. Ill. 1995).
413. *Id.* at 964–65.
414. *Id.* at 974.
415. *Id.* (citations omitted).
416. *Id.*

> cational agency.... Thus, this court finds that absent allegations that the Board knew of, or was directly involved in, any of the alleged discriminatory conduct in Counts IV-VI, plaintiff can not maintain a claim against the Board under Title IX.[417]

Thereafter, on July 21, 1995, the district court issued another decision,[418] stating:

> [T]his court does not read the *Cannon*, *Bell* and *Franklin* decisions as supporting the conclusion that the legislative history of Title IX demonstrates Congress' intent to have Title IX serve as an additional protection against gender-based discrimination regardless of the available remedies under Title VII. Accordingly, this court dismisses plaintiff's Title IX claim as being precluded by Title VII.[419]

During May 1995, three female professors alleged sex discrimination against the University of Iowa in *Brine v. University of Iowa*,[420] concerning the closing of the school's dental hygienist program, which was primarily composed of females.[421] The hygienist program was part of the dental program, which was taught by and had a significant number of men. The female professors were allegedly reassigned to lower paying positions. While the jury rejected their sex discrimination allegations, the jury awarded the women $210,000 in back pay and damages for retaliation in connection with the situation.

On October 3, 1995, the Fifth Circuit, in *Lakoski v. James*,[422] ruled that Title VII is the proper vehicle to bring an employment discrimination claim

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417. *Howard*, 876 F. Supp. at 974.

418. Howard v. Board of Educ. of Sycamore Comm. Unit Sch. Dist. No. 427, 893 F. Supp. 808 (N.D. Ill. 1995). *See also Howard*, 876 F. Supp. at 959 (regarding defendant's motion to dismiss the plaintiff's original complaint).

419. *Howard*, 893 F. Supp. at 815. The court agreed with several other decisions on this point, including *Wedding v. University of Toledo*, 862 F. Supp. 201 (N.D. Ohio 1994) and *Storey v. Board of Regents of Univ. of Wis.*, 604 F. Supp. 1200, 1205 (W.D. Wis. 1985) (holding that an employee of an educational institution cannot bring a private cause of action for gender discrimination under Title IX).

420. 90 F.3d 271 (8th Cir. 1996). *See also* Robin Wilson, *Federal Jury Rejects Sex-Bias Discharge at University of Iowa*, CHRON. HIGHER EDUC., May 12, 1995, at A20.

421. *Brine*, 90 F.3d at 272.

422. 66 F.3d 751 (5th Cir. 1995), *cert. denied sub nom.* Lakoski v. University of Tex., Med. Branch at Galveston, 117 S. Ct. 357 (1996) (inviting the Solicitor General to file a brief expressing the view of the United States). *Accord* Howard v. Board of Educ. of Sycamore

and that "individuals seeking monetary damages for employment discrimination on the basis of sex in federally funded educational institutions *may not* assert Title IX either directly or derivately through § 1983."[423] The case concerned a female professor who sued a hospital at the University of Texas for sex discrimination when she was denied tenure. Thus, the appellate court concluded that Title IX did not provide a private cause of action.[424] The Supreme Court declined to hear the appeal in this case during the October 1996 term.

In *Nelson v. University of Maine System*,[425] the district recognized that "[w]hile the First Circuit has yet to address a Title IX retaliation claim, the court's treatment of Title IX discrimination claims supports an extension of this analysis to Title IX retaliation claims,"[426] and the court utilized Title VII standards.[427] It stated that "[t]o satisfy the first prong of a prima facie case for retaliation, the conduct opposed need not necessarily violate Title IX; rather, the plaintiff need only have a good faith belief that a Title IX violation was occurring."[428]

VII. SEXUAL HARASSMENT

The area of sexual harassment in educational institutions is divided into two main areas, harassment involving students and harassment involving educational employees. Title VII, which concerns only *employment* sexual harassment, is being heavily relied upon in Title IX situations. A consensus is developing that the Title VII standards for sexual harassment, including

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Comm. Unit Sch. Dist. No. 427, 893 F. Supp. 808 (N.D. Ill. 1995); Wedding v. University of Toledo, 862 F. Supp. 201 (N.D. Ohio 1994).

423. 66 F.3d at 758 (emphasis added). *But see* Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993) (applying Title VI standard); Nelson v. University of Me. Sys., 914 F. Supp. 643, 649 (D. Me. 1996) (stating that "Title IX was specifically modeled after Title VI.") (citing Grove City College v. Bell, 456 U.S. 555, 586. (1984)).

424. *Lakoski*, 66 F.3d at 754.

425. 923 F. Supp. 275 (D. Me. 1996).

426. *Id.* at 279.

427. It noted further that

> an adverse employment action need not rise to the level of discharge to be actionable.... It must, however, at a minimum, impair or potentially impair the plaintiff's employment in some cognizable manner.... This Court is weary of defining an adverse employment action in a manner which discourages open communication, critical or otherwise, between employers or supervisors and their employees as to the employee's employment performance.

Id. at 281.

428. *Id.* at 284.

both quid pro quo sexual harassment and hostile environment sexual harassment, will be used for determining the Title IX causes of action.[429] As to the latter situation, the Supreme Court, during 1986, issued its landmark decision expounding upon Title VII hostile environment sexual harassment in *Meritor Savings Bank, F.S.B. v. Vinson*,[430] wherein the Court rejected a strict liability standard upon employers for sexual harassment involving their employees.[431] However, mere ignorance or lack of knowledge of the officious actions would not insulate the employers from complicity. Instead, as the court in *Pinckney v. Robinson*[432] stated, relying on *Vinson*:

> [F]or an employer to avoid [absolute] liability for its supervisor's sexual harassment creating a hostile work environment, an employer must not only show that it lacked actual or constructive knowledge of the harassment, but the employer must demonstrate that it had an effective and responsive system ("energetic measures") in place at the time of the alleged harassment and that this

429. *See, e.g.*, Lipsett v. University of P.R., 864 F.2d 881, 896–97 (1st Cir. 1988) (applying Title VII standard to a Title IX complaint by medical student-employee alleging hostile environment discrimination created by supervisors and fellow medical students); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993) (stating that hostile environment sexual harassment may be asserted by students against teachers pursuant to Title IX); Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986) (stating that Title IX hostile environment sexual harassment may be asserted by medical student concerning actions by her professor); Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980). *But see* Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) ("Additionally, a student can not bring a hostile environment claim under Title IX.") (citing Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989)). The only case cited which permits such an action is *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1583 (N.D. Cal. 1993), but even the *Petaluma* court requires evidence of intentional gender-based discrimination allegations that the school district knew or should have known of the harassment and failed to take appropriate corrective action are insufficient. Even though *Garza* dealt with peer sexual harassment at an educational institution, *Patricia H.* was not cited therein.

430. 477 U.S. 57 (1986). *See also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (imposing a "reasonable person" standard in ascertaining whether a hostile or an abusive work environment existed pursuant to a Title VII sexual harassment claim); Bradley Golden, Note, *Harris v. Forklift Systems, Inc.: The Supreme Court Takes One Step Forward and Two Steps Back on the Issue of Hostile Work Environment Sexual Harassment*, 1994 DET. C.L. REV. 1151 (1994); Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996).

431. *Vinson*, 477 U.S. at 72.

432. 913 F. Supp. 25 (D.D.C. 1996).

> system was one of which the victim knew or should have known and which he or she could have relied upon for a prompt and effective remedy.[433]

The EEOC issued regulations, defining sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used on the basis for employment decisions effecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.[434]

Within those parameters, this issue will be categorized into six areas: 1) coaches/athletes; 2) teachers/students (including physical education teachers); 3) supervisors/students; 4) others/students; 5) student/student (peer sexual harassment) imputed to the educational institution or school board; and 6) educational employment sexual harassment. Within this paradigm, three levels of sexual harassment are developing, including: 1) sexual abuse (including statutory rape); 2) quid pro quo harassment; and 3) hostile environment harassment.

While there is also a consensus that the actions by the offending individuals are intentional actions, the critical issue is what standard will be applied to analyze whether the recipient of federal funding will be held legally responsible for such conduct pursuant to Title IX. For example, two federal courts within the same jurisdiction within a matter of days came to opposite conclusions. The district court in *Rosa H. v. San Elizario Independent School District*[435] utilized a negligence standard to answer the question of whether the school district would be responsible for allegations of sexual abuse of a fifteen-year-old female student by a male after-school karate instructor.[436] Conversely, a few days prior to that decision, the district court in *Leija v. Canutilla Independent School District* [437] applied a strict

433. *Id.* at 34.

434. 29 C.F.R. § 1604.11(a) (1996).

435. 887 F. Supp. 140 (W.D. Tex. 1995), *rev'd*, No. 95-50811, 1997 WL 66087 (5th Cir. Feb. 17, 1997).

436. *Id.* at 143.

437. 887 F. Supp. 947 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

liability standard to the school district concerning allegations of sexual abuse of a second grade female student by a male physical education teacher, who was incidentally a coach.[438] The twist was that the district court would severely restrict the amount of Title IX damages that could be awarded. Of course, to complicate the matter even further, on June 26, 1996, the federal district court in *Nelson v. Almont Community Schools*[439] applied the Title VI standard to a case involving allegations of Title IX sexual harassment of a female student by a male teacher.[440] This lack of uniformity poses real problems to both the victims and the educational institution. There is also lack of uniformity when a 42 U.S.C. § 1983 claim is asserted by students, based on sexual harassment, claiming liability by the educational institution.[441] The crux of a 42 U.S.C. § 1983 claim is that the offending action is "state" action or done by a state actor.[442]

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438. *Id.* at 948–49.

439. 931 F. Supp. 1345 (E.D. Mich. 1996).

440. *Id.* at 1355.

441. *See, e.g.*, Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395, 1406 (5th Cir. 1996) (ruling that there was a basis for a 42 U.S.C. § 1983 claim against the school district based on allegations that a custodian had raped a female student at the school); Becerra v. Asher, 921 F. Supp. 1538, 1548 (S.D. Tex. 1996), *aff'd*, No. 96-2041, 1997 WL 35402 (5th Cir. July 25, 1997) (concluding that there was no state action by the school district based on the allegation of sexual abuse committed by a teacher, who was employed by the school district and was providing instruction to a child, being schooled at home); Diverglio v. Skiba, 919 F. Supp. 265, 269 (E.D. Mich. 1996); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994); Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452, 1461 (N.D. Cal. 1995) (discussed *supra* p. 628); Doe v. Rains Indep. Sch. Dist., 865 F. Supp. 375 (E.D. Tex. 1994), *rev'd*, 66 F.3d 1402 (5th Cir. 1995). In *Doe*, a female high school student alleged that her male physical education teacher and coach had sexually abused her, thereby depriving her of her Fourteenth Amendment liberty interest in bodily integrity, pursuant to a 42 U.S.C. § 1983 action. *Id.* at 377. On September 30, 1994, the district court found that "liability under section 1983 cannot be based on a theory of *respondeat superior*." *Id.* at 379. The Fifth Circuit reversed and remanded, finding that another teacher's alleged failure to report the incidents of sexual abuse pursuant to a Texas statute which required teachers to report child abuse in a timely manner, would not alone trigger the "state" action required for a 42 U.S.C. § 1983 violation. *Id.* at 1417. *See also* Doe v. Rains County Indep. Sch. Dist., 76 F.3d 666 (5th Cir. 1996). For 42 U.S.C. § 1983 cases discussing peer sexual harassment, see *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (male student sued his school based on allegations of verbal and physical abuse by a fellow male student for an extended period of time, starting in the eighth grade, due to the plaintiffs homosexual orientation); *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (male student with a hearing impairment brought suit against the superintendent of his school pursuant to 42 U.S.C. § 1983 for the sexual assaults inflicted by a fellow male student during on-campus living at the dormitory); and *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437 (S.D. Tex. 1994). In *Nabozny*, the school district

In the employment area, the individuals are generally adults and enter into the employment relationship presumably on equal planes. However, when the situation involves minor students, the scrutiny and protection should be greater. Therefore, while dependence on Title VII may be appropriate for the employment situation, should Title IX completely duplicate such Title VII protection, or should Title IX provide greater protection for its unique constituency?

In a record-breaking number, seventy-nine administrative complaints were filed in 1995 claiming sexual harassment in an educational setting. During February 1995, the OCR revised a pamphlet, "Sexual Harassment: It's Not Academic," exploring sexual harassment involving students. It states that "[s]exual harassment in educational institutions is not simply inappropriate behavior, it is against the law."[443] It defines sexual harassment as "consist[ing] of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX."[444] It advises that

> [a]n institution can either utilize its general grievance procedure, required by Section 106.8 of the Title IX regulation, or develop and implement special procedures for handling sexual harassment allegations. Given the especially sensitive nature of this form of sex discrimination, some institutions have opted for the latter course of action and/or have instituted specific training in handling

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reportedly settled the case for $900,000. Associated Press, *Gay Student Gets $900,000 for Harassment*, NEWSDAY, Nov. 21, 1996.

442. For pre-1994 decisions focusing on 42 U.S.C. § 1983 actions involving students and educational employees, see *D.T. v. Independent Sch. Dist. No. 16*, 894 F.2d 1176, 1183 (10th Cir. 1990) (concerning allegations of molestation of boys participating in summer basketball camp by a male teacher. The court placed emphasis on the fact that the boys were participating in a voluntary activity, which was not sponsored by the school). *See also* Jane Doe v. Special Sch. Dist., 901 F.2d 642 (8th Cir. 1990); Doe v. Douglas County Sch. Dist., 770 F. Supp. 591 (D. Colo. 1991); Sowers v. Bradford Area Sch. Dist., 694 F. Supp. 125 (W.D. Pa. 1988), *aff'd*, 869 F.2d 591 (3d Cir. 1989).

443. Office for Civil Rights, "Sexual Harassment: It's Not Academic" (Feb. 1995), at 1 [hereinafter OCR Pamphlet].

444. *Id.* at 2. During August, 1996, the OCR issued guidelines on peer sexual harassment which defined sexual harassment, stating "[u]nwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when the conduct is sufficiently severe, persistent or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment." Tamar Levin, *Kissing Cases Highlight Schools' Fear of Liability for Sexual Harassment*, N.Y. TIMES, Oct. 6, 1996, at 22.

> these cases. Title IX requires that grievance procedures be prompt and equitable.[445]

Another area under exploration is whether Title IX sexual harassment arises in same-sex situations.[446]

Nationally, the debate on proper sexual harassment policies at educational institutions arose out of a kindergarten boy who kissed a girl in his class and was charged with violating the school sexual harassment policy. The youngster when interviewed as to whether he knew what sexual harassment was, responded in the negative. The court in *Cohen v. San Bernardino Valley College*[447] explored a University's sexual harassment policy, concluding that it was unconstitutionally vague in violation of the First Amendment concerning freedom of speech and, therefore, did not put the English professor, charged with violating the policy, on proper notice.[448] The University's sexual harassment policy prohibited sexual harassment, which it defined as

> unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. it [sic] includes, but is not limited to, circumstances in which . . . [*inter alia*] has the purpose or effect of unreasonably interfering with an indi-

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445. OCR Pamphlet, *supra* note 443.

446. *See, e.g.*, Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996), (discussed *supra* p. 636); Nelson v. Almont Community Schs., 931 F. Supp. 1345 (E.D. Mich. 1996) (discussed *supra* p. 635). For 42 U.S.C. § 1983 cases, see, e.g., *Becerra v. Asher*, 921 F. Supp. 1538 (S.D. Tex. 1996), *aff'd*, No. 96-2041, 1997 WL 35402 (5th Cir. July 25, 1997); *Divergilio v. Skiba*, 919 F. Supp 265 (E.D. Mich. 1996).

447. 92 F.3d 968 (9th Cir. 1996). Judge Merhige issued the decision in *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746 (E.D. Va. 1995) (discussed *supra* p. 628).

448. *Cohen*, 92 F.3d at 972.

The court stated that:

> Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech . . . There are three objections to vague policies in the First Amendment context. First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discretionary application. Third, a vague policy discourages the exercise of first amendment freedoms.

Id. at 971–72.

> vidual's academic performance or creating an intimidating, hostile, or offensive learning environment.[449]

In that case, a female student charged a male professor with sexual harassment in violation of the school's policy. The male professor taught a remedial English class in which the female student was enrolled. It was reported that during a class on pornography the professor "stated in class that he wrote for *Hustler* and *Playboy* magazines and he read some articles out loud in class. [The professor] concluded the class discussion by requiring his students to write essays defining pornography."[450]

A. *Coach/Student Athlete*

Since Title IX's inception, there has been only one substantive Title IX decision examining sexual harassment between a coach and a student athlete.[451] However, during the 1990s the headlines have been replete with incidences of allegations of sexual harassment, uniformly concerning the improper activities of male coach's with their female student athletes,[452]

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449. *Id.* at 971.

450. *Id.* at 970. In addition, other "students came forward to testify about the sexual nature of Cohen's teaching material and his frequent use of derogatory language, sexual innuendo, and profanity." *Cohen*, 92 F.3d at 971.

451. *See* R.L.R. v. Prague Sch. Dist. I-103, 838 F. Supp. 1526 (W.D. Okla. 1993). *See* Heckman, *supra* note 15, at 1018–21 (discussing cases involving allegations of sexual harassment by coaches against student athletes). In the following cases, the offending male teachers, accused of sexual harassment involving a female student, were also, incidentally, coaches: *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992); *Bolon v. Rolla Pub. Schs.*, 917 F. Supp. 1423 (E.D. Mo. 1996); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (discussed *infra* 627). In the following cases, the offending male teacher, accused of sexual harassment involving a female student, were physical education teachers: *Rosa H. v. San Elizario Indep. Sch. Dist.*, 887 F. Supp. 140 (W.D. Tex. 1995), *rev'd*, No. 95-50811, 1997 WL 66087 (5th Cir. Feb. 17, 1997) (discussed *supra* p. 620 and *infra* p. 632); *Divergilio v. Skiba*, 919 F. Supp. 265 (E.D. Mich. 1996); *Doe v. Rains Indep. Sch. Dist.*, 66 F.3d 1402 (5th Cir. 1995) (discussed *supra* p. 621).

452. *See also* John T. Wolohan, *Title IX and Sexual Harassment of Student Athletes*, J. PHYSICAL EDUC. RECREATION & DANCE, Mar. 1995, at 52; Filip Bondy, *When Coaches Cross the Line*, N.Y. TIMES, May 2, 1993, § 8, at 1, 3. The University of Florida fired its swimming coach, Mitch Ivey, a former Olympian, reportedly for using offensive language; however, there was reported concern regarding his relationship with his female swimmers. *See* Linda Robertson, *Motivation and Manipulation: Athlete-Coach Bond Occasionally Leads to Temptation, Sexual Harassment*, MIAMI HERALD (1994) (discussing reported incidents involving other individuals and indicating that the American Swimming Coaches Association was the only coaches' association to adopt guidelines on ethical behavior in this area) (on file with the *Nova Law Review*); Don Sabo, Ph.D. & Carole Ogelsby, Ph.D., *Ending Sexual*

although female coaches are not exempt from such unsavory actions.[453] As a result, certain governing bodies, such as the American Volleyball Coaches Association, are issuing ethical guidelines.[454] Parenthetically, the cases involving the relationship between teachers and students are also instructive.

On February 21, 1996, the Sixth Circuit, in *Lillard v. Shelby County Board of Education*,[455] examined a number of allegations of sexual harassment based on Title IX and 42 U.S.C. § 1983 by three high school females against a male high school coach, who was also a physical science teacher. The teacher held a doctorate and coached the girls' soccer team, on which one of the plaintiffs participated. The coach allegedly slapped one of his athletes, a fourteen-year-old female plaintiff, across the face. The child's father informed the school principal of the incident. An FBI agent who learned about this incident informed the school principal that he had observed the coach "cursing and verbally abusing the girls at practices and games, and had 'observed [the coach] hitting the girls on their buttocks.'"[456] It was further alleged that he intentionally rubbed one of the other female plaintiff's stomach, while passing her in the hall, with a "remark that could be reasonably be interpreted as . . . inappropriate."[457]

The Sixth Circuit addressed a number of issues. First, it concluded that Title IX does not override a 42 U.S.C. § 1983 cause of action.[458] Second, it held that the state statute of limitations for personal injury actions would be

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Harassment in Sports, 4 WOMEN IN SPORT & PHYSICAL ACTIVITY J., Fall 1995, at 84–104. "It is also helpful to see sexual harassment in athletics as a form of child abuse." *Id.* at 95. This subsequent article also indicated that the United States Olympic Committee Coaching Ethics Code now includes a statement on sexual harassment. *Id.* at 98.

453. *See, e.g.*, Landreneau v. Fruge, 676 So. 2d 701 (La. 3d Cir. Ct. App.), *cert. denied*, 684 So.2d 930 (La. 1996) (concerning allegations of sexual misconduct against the school district and a female physical education teacher/coach of a female high school student; no Title IX claim was presented).

454. The American Volleyball Coaches Association's "Coaches Code of Ethics and Conduct" requires that the member coach abide by the following:

> Principle II - Coach/Athlete Relationship. G. Recognize that all forms of sexual abuse, assault or harassment with athletes are illegal and unethical, even when an athlete invites or consents to such behavior or involvement. Sexual abuse and harassment is defined as, but not limited to, repeated comments, gestures or physical contacts of a sexual nature. I will report all suspected cases of sexual assault or abuse to law enforcement as required by law.

American Volleyball Coaches Ass'n., *Coaches Code of Ethics and Conduct* (adopted December 1996).

455. 76 F.3d 716 (6th Cir. 1996).

456. *Id.* at 719.

457. *Id.* at 726.

458. *Id.* at 723.

applied.[459] As to the first incident, it found that "it is simply inconceivable that a single slap could shock the conscience" so as to be actionable.[460] In addressing the 42 U.S.C. § 1983 claims, it found that as to the hallway incident, which the court described as "wholly inappropriate, and, if proved, should have serious disciplinary consequences. . . . But without more, it is not conduct that creates a constitutional claim. It is highly questionable whether a *single, isolated incident* of this magnitude could even rise to the level of sexual harassment under Title VII."[461] The obtuse decision, while noting the FBI's unsolicited testimony, appeared to totally discount it in reaching its conclusion. The court emphasized that it was not reaching the merits of the Title IX claims alleged. Thus, it remains to be seen how the finder of fact will classify the incidents within the penumbra of Title IX.

During May 1996, members of the women's crew team filed a lawsuit against Temple University alleging sexual harassment based on a hostile environment created by coaches and members of the men's crew team. The lawsuit informs "that the room where the crew teams train was decorated with pornographic pictures and that male athletes made lewd gestures and comments to the women."[462] It was also reported that this was not the first lawsuit instituted against Temple University concerning the crew program. During 1994, a female student athlete charged that a male assistant part-time coach of the men's team made lewd gestures at the woman. The University fired this coach in 1993, when another athlete informed the school about another incident concerning this coach. The case was settled with the University agreeing to pay that plaintiff $5,000 and her dropping the charges and supposedly apologizing for the suit.[463]

It is difficult to ascertain how many lawsuits may have been commenced by female or male student athletes for sexual harassment actions by their coaches, especially when no publicity surrounds the filing of the lawsuit, and many settlement agreements routinely contain confidentiality clauses.

459. *Id.* at 729.
460. *Lillard*, 76 F.3d at 726.
461. *Id.* (emphasis added).
462. *Sidelines*, CHRON. HIGHER EDUC., June 7, 1996, at A33.
463. *Id.*

B. *Teacher/Student*

The lead case in this area is the 1992 Supreme Court decision in *Franklin v. Gwinnett County Public Schools*,[464] which focused on the remedies that Title IX provides, based on allegations of sexual harassment of a female student by a male teacher. The first decision to substantively deal with the issue of whether Title IX confers protection for students for hostile environment sex discrimination was *Patricia H. v. Berkeley Unified School District*,[465] involving allegations of sexual molestation of female students by a male band teacher. The plaintiffs asserted that the teacher's continued presence at the school alone established a hostile environment.

In *Doe v. Taylor Independent School District*,[466] a fifteen-year-old female student alleged sexual abuse by a male teacher (a biology teacher and coach) and abridgment of the Fourteenth Amendment Due Process Clause protecting liberty interests by the school district. On March 3, 1994, the Fifth Circuit held the plaintiff was deprived of her substantive due process protections.[467] No Title IX claim was alleged. The plaintiff's "due process claim is grounded upon the premise that schoolchildren have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and upon the premise that physical sexual abuse by a school employee violates that right."[468] However, the federal appellate court noted that a "school official's liability arises only at the point when the student shows that the official, by action or inaction, demonstrates a deliberate indifference to his or her constitutional rights."[469] The court elaborated:

> It is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment. Obviously, there is never any justification for sexually molesting a schoolchild, and thus, no state interest, analogous

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464. 503 U.S. 60 (1992).

465. 830 F. Supp. 1288 (N.D. Cal. 1993).

466. 15 F.3d 443 (5th Cir. 1994).

467. *Id.* at 451.

468. *Id.* at 450.

469. *Taylor*, 15 F.3d at 454. *See* Armstrong v. Lamy, 938 F. Supp. 1018 (D. Mass. 1996). In *Lamy*, there was no 42 U.S.C. § 1983 action to impute liability to the school board for an inadequate hiring policy based on allegations of sexual abuse by a teacher of a student. The court noted that "[a] supervisory official may, however, be held liable under § 1983 on the basis of his or her own acts or omissions." *Id.* at 1033.

> to the punitive and disciplinary objective attendant to corporal punishment, which might support it.[470]

Allegations of sexual harassment of a female sixth grade student by a student-teacher and fellow male students were presented in *Oona R.-S. v. Santa Rosa City Schools.*[471] The court declined to grant the individual student-teacher's 42 U.S.C. § 1983 motion to dismiss, as well as to certain classroom teachers and some other named school officials. The district court underscored that a 42 U.S.C. § 1983 claim does not foreclose a Title IX private cause of action.[472] Additionally, the court found that the conduct of an educational employee who engages in sexually harassing activities toward a student may be held culpable, provided that intentional discrimination is established, stating that "the Court finds that intentional discrimination is an element of a claim that an *individual official* has violated a plaintiff student's rights under Title IX by *engaging in* or *allowing* sexual harassment of that student."[473] However, the "plaintiff student must show that each defendant official either intentionally discriminated against her on the basis of sex or is liable under standard section 1983 supervisory liability principles for his own wrongful conduct in supervising a subordinate who intentionally discriminated."[474] The same standard would be applied to each school official concerning allegations by a student's peers or non-officials.[475]

On June 23, 1995, the district court in *Kadiki v. Virginia Commonwealth University*[476] held that a university could be held *strictly liable* under Title IX if a student successfully provided that her biology professor's

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470. *Id.* at 451–52. *See also* Wilson v. Webb, 869 F. Supp. 496 (W.D. Ky. 1994). In *Wilson*, two female students asserted a 42 U.S.C. § 1983 pursuant to the Fourteenth Amendment Due Process Clause concerning their liberty interests based on allegations of sexual molestation by one of their male teachers on school grounds. The teacher argued that the liberty interests protected were limited to those involving undue restraint. However, the court noted that "[s]choolchildren have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and physical sexual abuse by a school employee violates that right." *Id.* at 497.

471. 890 F. Supp. 1452 (N.D. Cal. 1995).

472. *Id.* at 1461. *But see* Mann v. University of Cincinnati, 864 F. Supp. 44 (S.D. Ohio 1994) (discussed *supra* p. 551).

473. *Id.* at 1464 (emphasis added).

474. *Id.* at 1465.

475. *Id.* at 1466. *See also* Bosley v. Kearney R-I Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995) (involving peer sexual harassment).

476. 892 F. Supp. 746 (E.D. Va. 1995). *See also* Slater v. Marshall, 906 F. Supp. 256 (E.D. Pa. 1995) (discussed *infra* p. 633).

conduct constituted quid pro quo sexual harassment.[477] The court stated that "knowledge of the *quid pro quo* harassment may be imputed to a university/employer need. . . ."[478] Furthermore, "[g]iven the purpose of Title IX and Congress' mandate that Title IX be broadly interpreted, it is essentially inconsequential that Title IX does not expressly adopt agency principles."[479]

Allegations of sexual abuse by a male physical education teacher of a female second grade student pursuant to Title IX were the focus in *Leija v. Canutilla Independent School District.*[480] While the child's primary teacher was told of some of the incidents, none of the members of the school board were notified. First, the district court found that only the educational institution, not the individual teacher, could be liable for Title IX violations.[481] The court dismissed the 42 U.S.C. § 1983 action because the board had "no knowledge of the abuse she suffered and therefore could not have been deliberately indifferent to her rights."[482] Query: Why should the student's informing the primary teacher not have constituted constructive knowledge by the school board? Assuming that the primary teacher was not required to inform the school principal and that the school principal was not required to bring this to the attention of the board, then should the lack of a proper policy not have been a question of fact for the jury as to the school board's failure to have a proper policy in place, in the first instance?

However, on the issue of whether the school district would be liable for the intentional actions of sexual abuse of this young girl, the court eschewed agency principles and instead applied strict liability standard. Thus, while "the court believes that the actions of a teacher should be strictly imputed to an educational institution. Concurrently, the court believes that limitations should be placed on damages."[483] In defending his position, the court stated that "[t]he young student, vulnerable in every way, should not be the only

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477. *Kadiki*, 892 F. Supp. at 755.

478. *Id.* at 754.

479. *Id.*

480. 887 F. Supp. 947 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996). The Fifth Circuit reversed, finding that the school district was entitled to judgment as a matter of law because the school district "had neither actual nor constructive notice of the sexual abuse." Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 402–03 (5th Cir. 1996). *See also* John Does 1, 2, 3, and 4 v. Covington County Sch. Bd., 884 F. Supp. 462, 464–65 (M.D. Ala. 1995) (holding that a Title IX cause of action exists against the school board, principal, and superintendent for allegations of sexual abuse committed by a teacher against elementary school students).

481. *Leija*, 887 F. Supp. at 957.

482. *Id.* at 950.

483. *Id.* at 948.

effective line of defense or the policing authority. The job of the student, especially the elementary student, is to learn in a trusting environment."[484]

This is the first court to so adopt a restricted position as to compensatory damages. The jury had awarded the plaintiff $1.4 million.[485] Interestingly, the district court indicated that the Fifth Circuit has clearly utilized Title VI of the Civil Rights Act[486] in determining Title IX cases.[487] However, the court distinguished that the Fifth Circuit did not address the issue of imputed liability under Title IX.

The court enunciated that "[t]here can be several types of school discrimination: (1) denial of access to the school or school's programs, normally but not always at the higher education level, (2) physical sexual abuse, or (3) non-physical but sexist harassment."[488] The court further elaborated that

> [t]he problem in teacher-student sexual abuse cases is therefore as follows: (1) only the school district can be liable under Title IX; (2) only intentional acts of discrimination are reached by Title IX; (3) the intentional acts can be committed by the district's employees who will never have authorization to act; so (4) unless the acts of the employees of the district are fully and strictly imputed to the district, Title IX becomes potentially inoperative.[489]

In balancing this strict liability, the court in the cases only of teacher-student sexual abuse would limit the damages to compensatory damages for merely expenses for medical treatment, expenses for mental health treatment, and expenses for special education, specifically omitting any monetary damages for pain and suffering. Identifying that unlimited damages, such as the million dollar verdict in this case, can bankrupt school districts, the court stated that "[p]ublic education is of critical importance to our Nation. Limited damages under Title IX protect the schools and simultaneously provide relief to sexually abused students .... In cases where rights are implied, 'appropriate' remedies will also be implied."[490] The Title IX statute

484. *Id.* at 955.
485. *Id.*
486. 42 U.S.C. §§ 2000d to 2000d-7 (1994).
487. *Leija*, 887 F. Supp. at 950 (citing Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993)).
488. *Id.* at 951.
489. *Id.* at 953.
490. *Id.* at 956.

contains no restriction on the amount of compensatory damages. Moreover, the court did not discuss at all the Title VII maximum cap of $300,000 damages as another possible option in this situation. Expect an appeal, as the court ordered a new trial on the issue of damages. Thus, while the analysis of the strict liability standard in this case is defensible, the limited damages, as promoted herein, stand on shaky grounds.

On October 17, 1995, the district court, in *Canutillo Independent School District v. National Union Fire Insurance Co.*,[491] ruled that an insurance contract did not specifically exclude Title IX claims against a school district.[492] Another judge issued this decision based on the underlying facts in *Leija*. The court exemplified that holding a school district in violation of Title IX for sexual harassment of a student by an employee required satisfaction of two elements. It requires

> that there be two distinct actions or inaction, at least one of which is intentional in nature, on the part of an employee and on the part of the school district . . . . Title IX does require proof of negligent, reckless or intentional acts by the school district, *independent* of the intentional conduct of the employee. This Court believes that to hold otherwise is to place the school district in the untenable position of being liable for conduct which it was, or is unable to remedy or rectify. Simply put, case law does not allow the school district (the insured) to be liable for the wrongful act of an employee under either Title IX or § 1983. There must be further wrongful conduct by a school district to prove a Title IX case.[493]

Note, the court did not require an intentional act by both the offending employee and the school district. On appeal, the Fifth Circuit reversed and rendered judgment in favor of the insurance company, relying principally on the fact that the underlying actions which prompted the lawsuit by the students against the school district were the actions of the physical education teacher, and noted that "the sexual assaults constitute criminal acts under Texas law."[494] It required some discriminatory act on the part of the school

491. 900 F. Supp. 844 (W.D. Tex. 1995), *rev'd*, 99 F.3d 695 (5th Cir. 1996). *See also* Board of Educ. of E. Syracuse-Minoa Cent. Sch. Dist. v. Continental Ins. Co., 604 N.Y.S.2d 399 (N.Y. App. Div. 1993) (holding a teacher's allegations of sexual harassment against the school district, for actions of the principal, not to constitute an "occurrence" within the meaning of the district's general liability policy).

492. *Canutillo*, 900 F. Supp. at 847.

493. *Id.* (emphasis added).

494. Canutillo Indep. Sch. Dist. v. Nat'l Fire Ins. Co., 99 F.3d 695, 702 (5th Cir. 1996).

district or its agents. Moreover, "we note that while injunctive relief may be available for failure to adopt Title IX's grievance policies and procedures, such a failure is not itself an act of discrimination that may be the basis of an award of damages."[495]

Three days after the *Leija* decision, another judge in the Western District of Texas issued his decision in *Rosa H. v. San Elizario Independent School District*[496] concerning allegations of sexual abuse of a fifteen-year-old female student by a twenty-nine-year-old male after school karate instructor, where karate was being offered by the school district. The jury awarded the plaintiff damages. First, the district court, as in *Leija*,[497] dismissed the 42 U.S.C. § 1983 action against the school district and the Title IX action against the offending school instructor. Second, there was no doubt that "any school district employee molesting students is acting outside the course and scope of his or her employment."[498] However, this court would also require a negligence standard to find the educational institution liable under Title IX. Thus, while "sexual abuse of a student is always an intentional act. However, to impute liability to the school district there must be some further action or inaction on the part of the school district which would give rise to liability."[499] The court stated that

> [t]o prevail on a claim of intentional discrimination under Title IX, the plaintiff must show that: 1) the school district is subject to Title IX; 2) plaintiff was sexually harassed or abused (the intentional conduct); 3) by an employee of the school district; 4) the school district had notice, either actual or constructive, of the sexual harassment or abuse; 5) the school district failed to take *prompt, effective, remedial measure*; and 6) the conduct of the school district was negligent.[500]

This court also did not require an intentional act by both the offending employee and the school district itself. In this construct, the notice provision allows the school district an opportunity to do something about the situation. In addition, the fifth element entails "that the school district be given

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495. *Id.* at 706.

496. 887 F. Supp. 140 (W.D. Tex. 1995).

497. *Leija*, 887 F. Supp. 947 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996) (discussed *supra* p. 629).

498. *Id.* at 142.

499. *Id.* at 143.

500. *Id.* (emphasis added).

opportunity to act on behalf of the student, that is, terminate the discriminatory conduct, before being subject to liability."[501]

In *Slater v. Marshall*,[502] a female student's complaint against the Montgomery County Community College created a claim under Title IX for quid pro quo sexual harassment by a male professor, based on her being foreclosed from meaningful course work on the basis of gender. However, the complaint failed to state a cause of action under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment, the American with Disabilities Act,[503] and section 504 of the Rehabilitation Act.[504]

The January 5, 1996, district court decision in *Bolon v. Rolla Public Schools*[505] carved out the four standards that the courts are using to determine a school district's liability for sexual harassment by teachers of their students. The courts stated that

> [c]ourts have adopted several different approaches, including the following: (1) the agency principle . . . (essentially a 'negligent or reckless' standard) . . . ; (2) knowledge or direct involvement by the school district, . . . ; (3) the Title VII standards of employer liability in sexual harassment cases (i.e., 'knew or should have known' for hostile environment and strict liability for quid pro quo harassment) . . . ; and (4) strict liability.[506]

After reviewing the aforementioned, the court concluded:

> This Court, guided by the Supreme Court's *Franklin* decision interpreting Title IX, holds that intentional discrimination by teachers is imputed to the school district under the principles of respondeat superior, *regardless* of whether the intentional discrimination is the creation of a hostile environment, the demand for sexual favors, the

501. *Id.*
502. 906 F. Supp. 256 (E.D. Pa. 1995).
503. *Id.* (citing 42 U.S.C. §§ 12101–12213 (1995)).
504. *Id.* (citing 29 U.S.C. §§ 701–796 (1985 & Supp. 1995)).
505. 917 F. Supp. 1423 (E.D. Mo. 1996).
506. *Id.* at 1427. In *Nelson v. Almont Community Schs.*, 931 F. Supp. 1345 (E.D. Mich. 1996), the district court applied the Title VI intentional discrimination standard to a Title IX case involving allegations of sexual harassment of a male student by a female English teacher.

> removal of females from the classroom, or any other intentional action based on sex in violation of Title IX.[507]

The court explained:

> If Title IX is to have any effect, school districts must be held strictly liable for the actions of a teacher who engaged in blatant sex discrimination, for example, requiring all females to sit in the hall during class. Otherwise, the school would be effectively insulated from all Title IX liability.[508]

Furthermore,

> [i]n light of the Supreme Court's holding in *Franklin* that sexual harassment constitutes intentional sex discrimination in violation of Title IX, there is simply no reason to apply a different standard of liability when a teacher discriminates by engaging in a sexual relationship with a student rather than by denying him or her an education.[509]

Thus, the court denied the defendant's motion for summary judgment.

The district court in *Pallett v. Palma*[510] elaborated on institutional responsibility when allegations of sexual harassment are raised involving actions by a professor at a university, stating that "[t]he institution of higher learning satisfies its legal obligation under facts similar to these cases unless it provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."[511] The court seemed satisfied that a sexual harassment prohibition notice was provided to the students and employees, as well as a grievance procedure, commenting that

> the College upon learning of the plaintiff's sexual harassment allegations took appropriate remedial action and to the extent that it was unable to or failed to take appropriate remedial action the College was prevented from doing so by the failure and active refusal of the plaintiffs to cooperate with the College administration in pressing formal charges and testifying at the necessary faculty

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507. *Id.* at 1427–28 (emphasis added). The court noted, however, that it was not required to address the standard concerning peer sexual harassment. *Id.* at 1428 n.2.

508. *Id.* at 1429.

509. *Id.*

510. 914 F. Supp. 1018 (S.D.N.Y. 1996).

511. *Id.* at 1024.

> hearing to terminate [the professor's] tenure upon the required finding of *gross misconduct.*[512]

In this case, upon learning of allegations of separate incidents of sexual harassment involving a female undergraduate student and a female graduate student (who was also a University employee), the school suspended the offending tenured professor.

The plaintiffs elected to forego the University's own process, which could have resulted in the professor's termination, and commenced a lawsuit instead. The court noted:

> That a faculty member on occasion will violate the published policies of an institution and do so clandestinely, as here, is not a basis for students or employees who have eschewed the established procedures for rectifying the wrong done to them, to run instead to the courts, to mulct the charitable funds of a non-profit teaching institution. These funds could be used better for the instruction of other students.[513]

In situations of sexual harassment and abuse, the offending individuals often rely on the silence of their victims; however, Title IX does not require that an individual first exhaust a school's internal grievance process or even exhaust an administrative process before instituting a lawsuit. Therefore, it would appear that the *ad hominem* criticism of the plaintiffs' elected course of action seems gratuitous and unnecessary, as according to the court the issue was simply whether the educational institution had a policy in place. Furthermore, it is not the nonprofit status of the educational institution that is the main concern herein, as almost exclusively, educational institutions are nonprofit institutions. Rather, the focus of Title IX is that federal funds should not be used to promote or condone sexual harassment and sex discrimination by these educational institutions, who voluntarily elect to receive such federal funding or allow their students to do so regardless of whether the institution is non-profit or for-profit.

In *Nelson v. Almont Community Schools,*[514] a male high school student, who attempted suicide allegedly because his female English teacher would not allow him to end their relationship, claimed Title IX sexual harassment against the school board. On June 26, 1996, the district court, recognizing

512. *Id.* (emphasis added).
513. *Id.*
514. 931 F. Supp. 1345 (E.D. Mich. 1996).

the conflict in the standard being applied to analyze Title IX sexual harassment, summarized the standards being applied as follows:

> Some courts follow the agency principles continued in the RESTATEMENT (SECOND) OF AGENCY § 219(2)(6) (essentially a "two-tort" negligent or reckless conduct standard showing the intentional tort of the employee and the negligence of the school district) . . . . Others, persuaded by the *Franklin* Court's reference to *Meritor* . . . which was a Title VII employment discrimination case, have applied the Title VII standard of employer liability (i.e., "knew or should have known" for hostile environment claims, and strict liability for quid pro quo harassment) . . . . A number of courts, because of the above-quoted discussion in *Franklin* of "intentional" discrimination, have adopted the Title VI intentional discrimination standard, and require a showing of knowledge standard, and require a showing of knowledge or direct involvement by the school district in the discrimination or failure of the school to take appropriate remedial action . . . . A few courts have applied a "strict liability" standard.[515]

This court ultimately determined:

> This Court agrees with those courts which apply the Title VI intentional discrimination standard. Intentional discrimination requires either (A) a showing of direct involvement of the school district in the discrimination, or (B) a showing of (1) actual or constructive knowledge on the part of the district of the sexual harassment of a student *and* (2) that the school failed to take immediate appropriate action reasonably calculated to prevent or stop the harassment.[516]

The August 26, 1996, Eighth Circuit decision in *Kinman v. Omaha Public School District*[517] is notable because the court found that a Title IX sexual harassment hostile environment action can be brought when it involves the same sex. *Kinman* involved allegations of a homosexual relationship between a female English teacher and a female high school student.[518] The appellate court found "no reason to apply a different standard under Title IX. The uncontroverted evidence shows that McDougall

515. *Id.* at 1355.
516. *Id.*
517. 94 F.3d 463 (8th Cir. 1996).
518. *Id.* at 465.

targeted Kinman because she was a woman."[519] As to what standard should be applied in this Title IX case, the court instructed that:

> We recently held that Title VII standards for proving discriminatory treatment should be applied to employment discrimination cases brought under Title IX. We now extend that holding to apply Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student. . . . In such cases, the employer should not be held liable unless the employer itself has engaged in some degree of culpable behavior. For example, the employer could be held liable if it knew or should have known of the harassment and failed to take appropriate remedial action.[520]

Thus, the "'knew or should have known' standard is the appropriate standard to apply. . . ."[521]

C. *Supervisor/Student*

In *Randi W. v. Livingston Union School District*,[522] a thirteen-year-old female commenced a lawsuit in a California state court, alleging sex discrimination as the result of molestation by a male vice principal of the school.[523] This court found that Title IX did not extend statutory liability on the school district for the Vice Principal's actions.[524] Aside from the *Karibian v. Columbia University*[525] case, there were no other decisions rendered concerning allegations of sexual harassment by a supervisor during the three-year time period.[526]

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519. *Id.* at 468.
520. *Id.* at 469 (citations omitted).
521. *Id.*
522. 49 Cal. Rptr. 2d 471 (1996).
523. *Id.* at 473.
524. *Id.* at 488.
525. 14 F.3d 773 (2d Cir. 1994) (discussed *infra* p. 649).
526. *See* Hastings v. Hancock, 842 F. Supp. 1315 (D. Kan. 1993). The case featured allegations of Title IX sexual harassment of a female student by a male director of a vocational educational school. The court recognized "that in many cases decided under Title VII, courts have held that an act of a supervisor with direct authority over the harassee makes an employer directly liable for any violations of Title VII." *Id.* at 1320 (citations omitted).

D. *Other/Student*

In *Murray v. New York University College of Dentistry*,[527] a male patient at the dental clinic where the plaintiff, a female dental student, was required to provide services as part of her clinical curriculum was badgering and stalking the plaintiff, according to the allegations. Another dental student informed the chief of the dental clinic that the patient was "unstable" and was sexually harassing the plaintiff.[528] The chief informed the patient to desist with his activities. The plaintiff never advised her professors or the clinic chief that the actions were continuing until after she received a notice from the College informing her that, due to her failure to successfully complete ten out of twenty-eight courses, she would be required to redo her second year. Subsequently, in a letter to the review board, she explained that the subpar performance was due to the illness of a family member, having to work another job to finance her tuition, and the actions of the clinic patient. After receiving the letter, the board did not rescind its determination. The plaintiff contended that the college violated Title IX by "(1) allowing the discriminatory abusive environment created by [the patient] to persist after the College had notice of it, and (2) retaliating against her for asserting her right under Title IX to be free from discrimination on the basis of gender."[529]

The Second Circuit reviewed the conclusions of the district court and held that

> the facts alleged in the complaint would not support a finding either (1) that NYU had notice of ongoing harassment sufficiently severe and pervasive to give rise to a "hostile environment" under Title VII standards or (2) that after receiving notice that harassment had occurred, the College took any action disadvantageous to Murray

527. 57 F.3d 243 (2d Cir. 1995). *See* Floyd v. Waiters, 831 F. Supp. 867 (M.D. Ga. 1993) (holding that no Title IX claim was established against the school district for sexual assaults committed by a male security guard against female students). The court in *Floyd* did not address whether the educational institution had a responsibility to properly investigate the background of this individual employee and whether any complaints had been filed against him during his employment. *See also* Larson v. Miller, 76 F.3d 1446 (8th Cir. 1996). In *Larson*, the district court set aside a jury verdict of $475,000 in favor of a handicapped female student who was sexually abused by a male driver who drove the van which brought the plaintiff to her school. The driver was imprisoned as a result of his actions. However, the appellate court found that the school district was not civilly liable for failing to thoroughly investigate the plaintiff's first complaint of sexual abuse. *Id.* at 1457.

528. *Murray*, 57 F.3d at 275.

529. *Id.* at 247.

> from which an inference of discriminatory retaliation could be drawn.[530]

First, the Second Circuit indicated that "Title IX has been construed to prohibit gender discrimination against both students enrolled in federally supported educational programs and employees involved in such programs."[531] Second, the court noted that "[i]n reviewing claims of discrimination brought under Title IX by employees, whether for sexual harassment or retaliation, courts have generally adopted the same legal standards that are applied to such claims under Title VII."[532] In analyzing Title VII sexual harassment claims, the Second Circuit noted that "[w]hether the harassing conduct of a supervisor or coworker should be imputed to the employer is determined in accordance with common law principles of agency."[533] However,

> [i]n contrast, employer liability for a hostile environment created by coworkers, or by a low-level supervisor who does not rely on his supervisory authority in carrying out the harassment, attaches only when the employer has 'either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.[534]

Since the plaintiff "fail[ed] to allege that even NYU's agents knew or should have known of the continued harassment in the present case,"[535] the Second Circuit affirmed the dismissal of the plaintiff's complaint.

In an unusual case, *Brown v. Hot, Sexy & Safer Productions, Inc,*[536] students contended that compulsory attendance and some of the conduct at an AIDS awareness program put on by an outside company at the school constituted a Title IX violation due to the establishment of a hostile envi-

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530. *Id.*

531. *Id.* at 248 (citations omitted).

532. *Id.* The court did make reference to the fact that it "looked primarily to Title VII, as well as to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (1988) (prohibiting racial discrimination in federally supported educational programs), in defining the contours of a student's private right of action under Title IX for gender discrimination occurring in college discriminatory proceedings." *Murray*, 57 F.3d at 248. (citing Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994)).

533. *Id.* at 249 (citations omitted).

534. *Id.* (citations omitted).

535. *Id.* at 250.

536. 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996).

ronment based on sexual harassment.[537] On October 23, 1995, the First Circuit noted that, because the Title IX case law was sparse, it would apply the Title VII standards.[538] As such, "the court must consider not only the actual effect of the harassment on the plaintiff, but also the effect such conduct would have on a reasonable person in the plaintiff's position."[539] The court concluded, based on facts involved herein, "[i]f anything then, they allege discrimination based upon the basis of viewpoint, rather than on the basis of gender, as required by Title IX."[540] Thus, the appellate court affirmed the dismissal of the plaintiffs' complaint.

On April 23, 1996, the Fifth Circuit, in *Doe v. Hillsboro Independent School District*,[541] a case involving allegations of the rape of a female student by a male custodian, determined that it did not have appellate jurisdiction to review whether Title IX causes of action were valid in this interlocutory appeal.[542] The school district was not a party to this appeal, which was brought by individually named defendants. The court, in dicta, noted that there is no Title IX claim against individuals.[543] However, the court held that the plaintiffs could go forward with their 42 U.S.C. § 1983 claims against individual officials based on allegations of inadequate hiring policies and inadequate supervision stemming from the officials' deliberate indifference to the custodian's criminal record.[544]

E. *Student/Student (Peer Sexual Harassment)*

1. Interscholastic Students

In *Aurelia D. v. Monroe County Board of Education*,[545] an action for Title IX peer sexual harassment brought by a female fifth grade student

537. *Id.* at 529.
538. *Id.* at 540 (citations omitted).
539. *Id.*
540. *Id.* at 541.
541. 81 F.3d 1395 (5th Cir. 1996).
542. *Id.* at 1407.
543. *Id.* at 1400 n.9.
544. *Id.* at 1403. *See also* Armstrong v. Lamy, 938 F. Supp. 1018 (D. Mass. 1996). In *Lamy*, a 42 U.S.C. § 1983 action, the district court stated that "[t]o prove that a hiring policy violated her rights, [the plaintiff] must show that (1) the hiring procedures were inadequate; (2) the school officials were deliberately indifferent in adopting the hiring policy; and (3) the inadequate hiring policy was a cause of his injury." *Id.* at 1036. *See also supra* note 469.
545. 862 F. Supp. 363 (M.D. Ga. 1994), *aff'd in part and rev'd in part sub. nom.* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), *vacated*, 91 F.3d 1418 (11th Cir. 1996). *See also* Houston v. Mile High Adventist Academy, 872 F. Supp. 829 (D. Colo.

against the school board for the alleged actions of a fellow male fifth grade student, included the touching of her breasts and vaginal area, and using vulgar language toward the plaintiff. The plaintiff reported these incidents to her teacher, who only verbally admonished the offending student. The alleged sexual harassing activities continued. The principal had also been notified. On August 29, 1994, the district court determined that

> the sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of the Board had any role in the harassment. Thus, any harm to [the plaintiff] was not proximately caused by a federally-funded educational provider.[546]

The court, disregarding the decision in *Doe v. Petaluma School District*,[547] thus found "no basis for such a cause of action in Title IX or case law interpreting it"[548] for the imposition of Title IX liability on the Board for peer sexual harassment of which the school becomes aware.

During 1996, the Eleventh Circuit explored the issue of whether a violation of Title IX occurs when allegations of sexually hostile environments are created due to the actions of a fellow student, and thus impute liability to the school board. On February 14, 1996, the circuit court in *Davis v. Monroe County Board of Education*,[549] ruled it would apply Title

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1994). In *Houston*, a female plaintiff alleged that a teacher allowed students to use his home for sexual relations. The plaintiff was sexually assaulted by a male student at the teacher's residence. No Title IX claim was raised. The district court held that under Colorado law there was no fiduciary duty between the private school and student. *Id.* at 835. *Cf.* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 169 (N.D.N.Y. 1996). In *Bruneau*, the district court applied a modified Title VII standard for peer sexual harassment to a Title IX claim. *Id.* at 169. This court rejected utilization of constructive notice and instead required that "[t]he plaintiff must show that the school and/or school board received *actual* notice of the sexual harassing conduct and failed to take action to remedy it." *Id.* at 173. The trial occurred during November 1996. The attorney for the school district argued in closing summations that "[n]ame-calling and inappropriate touching among sixth-graders amounts to misbehavior, not sexual harassment. . . ." Associated Press, *Gay Student Gets $900,000 for Harassment*, NEWSDAY, Nov. 21, 1996, at A18. *See also* Levin, *supra* note 444, at 22.

546. *Aurelia D.*, 862 F. Supp. at 367.

547. 830 F. Supp. 1560 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995). *See also* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

548. *Aurelia D.*, 862 F. Supp. at 367.

549. 74 F.3d 1186 (11th Cir. 1996).

VII standards to determine this type of Title IX sex discrimination case.[550] It stated:

> Thus, we conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and *tolerated* by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.[551]

The Eleventh Circuit ruled that

> [t]he elements a plaintiff must prove to succeed in this type of sexual harassment case are: (1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.[552]

Moreover, the Title VII use of the common law principles of agency will be applied to determine the fifth element.[553] Finally, the court informed that

> [i]n determining whether a plaintiff has established that an environment is hostile or abusive, a court must be particularly concerned with (1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether it is physically threatening or humili-

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550. *Id.* at 1191 (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75–76 (1992)).

551. *Id.* at 1193 (emphasis added) (citations omitted). *See also* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996). In *Burrow*, the female plaintiff had a party at her parents' farmhouse, without their presence, which resulted in property damage approximating $1,500. The plaintiff apprised the school of the names of the individuals responsible. Subsequently, according to her allegations, she and her family informed the school of a slew of verbal and physical assaults and alleged that the defendants "failed to take any meaningful action to end the harassment and protect" the plaintiff. *Id.* at 1196. The plaintiff further alleged that she graduated a semester early to escape the ongoing hostile school environment. "[P]rior to October of 1992, the School District had no official policy to deal with cases of sexual harassment . . . and that prior to June of 1993, the School District had no grievance procedure for claims of sexual harassment." *Id.* at 1198.

552. *Davis*, 74 F.3d at 1194 (citations omitted).

553. *Id.* at 1195.

> ating rather than merely offensive; and (4) whether it unreasonably interferes with the plaintiff's performance. The Court has explained that these factors must be viewed objectively and subjectively.[554]

Doe v. Petaluma School District[555] concerned allegations of verbal sexual harassment of a female student by a male junior high school student, as well as from female students, where the school counselor did nothing after being informed. The allegations included sexual comments, references to her breasts, and lewd writings about the plaintiff on the bathroom walls. First, the district court held that student-to-student harassment is actionable under Title IX.[556] Second, in elaborating on what standard should be applied, it noted that

> [t]he 'knew or should have known' standard is in essence a negligence standard.... Discriminatory intent (or discriminatory animus) means that one actually meant to discriminate.... Thus, a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex.[557]

Third, "individuals may not be held personally liable under Title IX.... [I]t is the educational institution that must be sued for violations of Title IX."[558]

On May 12, 1995, the Ninth Circuit, in a 2-1 decision, encapsulated the issue to whether the high school counselor had a legal duty at the time of the 1990–92 incidents which would have required him in his official capacity to do something about it. The court stated that "[w]e must examine the state of Title IX law as it existed between the rulings of *Cannon* and *Franklin*. In doing so, we conclude that it was not clearly established, at the time of [the counselor's] alleged inaction, that he had a duty to prevent peer sexual harassment."[559] The court also concluded that an opinion letter (letter of findings) issued by the OCR was insufficient enough to establish such a duty. The appellate court, however, cautioned that if the counselor "engaged

554. *Id.* at 1194.
555. 830 F. Supp. 1560 (N.D. Cal. 1993).
556. *Id.* at 1563.
557. *Id.* at 1576.
558. *Id.* at 1576–77.
559. *Doe*, 54 F.3d at 1451.

in the same conduct today, he might not be entitled to qualified immunity."[560]

The dissent noted that while there was no Title IX case explicating that a school official would be liable for failing to stop peer sexual harassment, the court should not have provided the counselor with immunity.[561] "Just as an employer must take remedial action 'reasonably calculated to end' coworker harassment . . . so too must school officials take remedial action reasonably calculated to end peer harassment."[562]

In another case, *Seamons v. Snow*,[563] after the plaintiff, the backup quarterback, had exited the shower area, members of the high school football team used athletic tape to bind him to a towel rack in the boys' locker room. While the plaintiff was restrained, another male student brought a female student, whom the plaintiff had taken to a homecoming dance, into the locker room where she observed the undressed plaintiff. The football coach then suspended and dismissed the plaintiff from the team. Thereafter, the superintendent canceled the remaining football season. The plaintiff alleged a hostile educational environment in violation of Title IX. On October 4, 1994, the federal district court granted the defendants' motion to dismiss the action, including the Title IX claim.[564]

The court came to a number of conclusions. First, as a general observation, the court stated that "Title IX's protections arise when sex is the motive behind a harmful discriminatory act. Title IX was not intended to create a genderless society in which every act gives rise to a cause of action simply because it affects a male or female."[565] Second, the court emphasized the three elements necessary to establish a Title IX claim: "(1) that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program; (2) that the program receives

560. *Id.* at 1452.

561. *Id.* at 1453–54 (Pregerson, J., dissenting). The dissent cited the following Title IX cases: *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Lipsett v. University of P.R.*, 864 F.2d 881 (1st Cir. 1988); *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987); *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986); and *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980). *Id.*

562. *Id.* at 1455.

563. 864 F. Supp. 1111 (D. Utah 1994), *aff'd in part and rev'd in part*, 84 F.3d 1226 (10th Cir. 1996).

564. *Id.* at 1123.

565. *Id.* at 1116.

federal assistance; and (3) that his or her exclusion from the program was on the basis of sex."[566]

Third, the court found the parents of the plaintiff did not have standing as beneficiaries of Title IX protection, which is in accord with *R.L.R. v. Prague Public School District I-103*.[567] Fourth, the court also concluded that the plaintiffs in a Title IX action must establish discriminatory intent.[568] Fifth, the court concluded that the defendants' failure to either adopt a sexual harassment policy or to designate a Title IX coordinator and grievance policy affects both the females and males equally. Therefore, as a matter of law, the plaintiffs did not demonstrate an intent to discriminate.[569]

Finally, the district court went further and determined that Title IX does not create a cause of action based on negligence for a hostile environment.[570] Furthermore, since the defendants' conduct was not sexual in any way, the plaintiff's allegations were not sufficient to constitute a claim of sexual harassment.[571] The Tenth Circuit affirmed the decision as it concerned the Title IX determination on May 8, 1996, but reversed as to the district court's dismissal of the plaintiff's claim regarding freedom of speech.[572]

In *Mennone v. Gordon*,[573] the female plaintiff, a high school senior, alleged sexual harassment by a male high school student. He repeatedly insulted and assaulted her, "making remarks about her breasts, grabbing her hair, legs, breasts and buttocks, and threatening to rape her. [The teacher] did nothing to stop [the student's] actions. . . . [and t]he school administration took no action against [the male student]."[574] The district court stated that

566. *Id.* (citing Bougher v. University of Pittsburgh, 713 F. Supp. 139, 143–44 (W.D. Pa. 1989), *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989)).

567. 838 F. Supp. 1526 (W.D. Okla. 1993).

568. Seamons v. Snow, 864 F. Supp. 1111, 1117 (D. Utah 1994) (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 603; Doe v. Petaluma Sch. Dist., 830 F. Supp. 1560, 1563 (N.D. Cal. 1993)). *But see* Heckman, *supra* note 15, discussing sexual harassment under Title IX, and specifically the text accompanying notes 354–56 discussing *Guardians*. The position articulated in *Seamons* is apposite the stance in other jurisdictions. *See, e.g.*, Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 788 (3d Cir. 1990); Haffer v. Temple Univ., 678 F. Supp. 517, 539 (E.D. Pa. 1987). *Haffer* is discussed in Heckman, *supra* note 92, at 22–23.

569. *Seamons*, 864 F. Supp. at 1122.

570. *Id.* at 1118.

571. *Id.* at 1119.

572. Seamons v. Snow, 84 F.3d 1226, 1239 (10th Cir. 1996).

573. 889 F. Supp. 53 (D. Conn. 1995).

574. *Id.* at 54–55.

> [l]ogically, the language of Title IX demands that a defendant must exercise some level of control over the program or activity that the discrimination occurs under. Thus, the plain language of the statute sets forth a functional restriction that does not preclude individual defendants, as long as they exercise a sufficient level of control.[575]

Furthermore, the court concluded that "Title IX has a sufficiently comprehensive enforcement scheme to demonstrate that Congress intended to foreclose enforcement through § 1983."[576] Allegations of peer sexual harassment of a female student by fellow male students were also addressed in the May 2, 1995, decision in *Oona R.-S. v. Sant Rosa City Schools.*[577]

In another case, *Bosley v. Kearney R-I School District,*[578] a female student complained that other students were sexually harassing her. She brought suit against the school district on a number of grounds, including violation of substantive due process under the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983, and Title IX.[579] The district court ruled on October 19, 1995, that the plaintiff's parent was not a proper party plaintiff.[580] The court determined there was no Fourteenth Amendment violation[581] and enunciated that "compulsory school attendance does not create the custodial relationship necessary to impose constitutional liability on the defendant school district for failing to protect [the plaintiff] against alleged sexual harassment by her fellow students."[582] It also found that Title VII law provided the standards for enforcing the anti-discrimination provisions of Title IX.[583] The court stated that "[d]iscriminatory intent is a fluid concept that is sometimes subtle and difficult to apply."[584] Additionally, there

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575. *Id.* at 56.
576. *Id.* at 59–60.
577. 890 F. Supp. 1452, 1455 (N.D. Cal. 1995) (discussed *supra* p. 628).
578. 904 F. Supp. 1006 (W.D. Mo. 1995).
579. *Id.* at 1013.
580. *Id.* at 1020.
581. *Id.* at 1019.
582. *Id.* at 1018.
583. *Bosley*, 904 F. Supp. at 1022. "*Franklin* supports the conclusion that Title VII law provides standards for enforcing the anti-discrimination provisions of Title IX." *Id.* "The Office for Civil Rights also uses Title VII's hostile environment standard in determining that an educational institution's failure to take appropriate remedial action regarding known student-to-student sexual harassment is a violation of Title IX." *Id.*
584. *Id.* at 1020 (citations omitted). "It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 1021.

existed a genuine issue of material fact as to whether the school district intentionally discriminated against the female student based on her sex. It cautioned that, "[o]nce a school district becomes aware of sexual harassment, it must promptly take remedial action which is reasonably calculated to end the harassment."[585] "[T]here is no notice problem where a school intentionally discriminates."[586]

The district court stated that "[d]iscriminatory intent is not synonymous with discriminatory motive. Neither does it require proof that unlawful discrimination is the sole purpose behind each act of the defendant being scrutinized."[587] The court elaborated that discriminatory intent may be demonstrated by "direct" evidence, or by inference as "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[588]

The court set forth the elements required to establish a claim of sex discrimination for student-on-student (peer) sexual harassment in any educational program or activity receiving federal funds as follows:

> 1) the plaintiff was subjected to unwelcome sexual harassment; 2) the harassment was based on sex; 3) the harassment occurred during the plaintiff's participation in an educational program or activity receiving federal financial assistance; and 4) the school district *knew* of the harassment and *intentionally failed to take proper remedial action.* If the finder of fact makes these findings, the finder of fact may infer that defendant intentionally failed to take appropriate remedial action because of plaintiff's gender.[589]

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585. *Bosley*, 904 F. Supp. at 1023.

586. *Id.* at 1025.

587. *Id.* at 1020.

588. *Id.* at 1021 (citing Washington v. Davis, 426 U.S. 229 (1976)). *See also* Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996). In *Wright*, the court stated:

> In light of the preceding analysis, this court agrees with the majority view that Title IX encompasses a claim for peer-to-peer sexual harassment. However, the court does not believe that a school district can be held liable under Title IX for its *negligent* failure to remedy the sexually harassing behavior by a student's peers despite its knowledge of such behavior. The Supreme Court's opinion in *Franklin* explicitly demands more than mere negligence to create liability for monetary damages for a violation of Title IX—it requires plaintiffs to show intent to discriminate.

Id. at 1419.

589. *Bosley*, 904 F. Supp. at 1023 (emphasis added).

2. Intercollegiate Athletes

In addition to Title IX, female co-eds are beginning to assert violations of the 1994 Violence Against Women Act.[590] Examples of such assertions by female co-eds can be found in two 1996 cases in which the females alleged that they had been raped by male football athletes at their respective schools.[591]

F. *Employment Sexual Harassment*

In *Ward v. Johns Hopkins University,*[592] two female employees at Johns Hopkins University instituted suit claiming sexual harassment by a fellow male employee in violation of Title IX.[593] One of the plaintiffs also alleged sexual harassment and retaliation in violation of Title VII.[594] The University moved for summary judgment. On April 22, 1994, the district court noted that "[t]he Supreme Court has recognized that the sexual harassment of an employee may give rise to a claim of sex discrimination under Title VII."[595] The court discussed the two theories utilized to predicate such a claim: quid

590. Violence Against Women Act of 1994, 42 U.S.C. §§ 13981–14040 (1994), Pub. L. No. 103-322, 108 Stat. 1902–55 (1994). This Act provides for compensatory damages and was promulgated under the Fourteenth Amendment Equal Protection Clause and the Commerce Clause of the Constitution.

591. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 772 (W.D. Va. 1996) (dismissing the plaintiff's Title IX claim against the University). The female co-ed at the University claimed she was raped by two male football players (who were not indicted by the grand jury) who she claimed received preferential treatment by the University. In *Brzonkala*, the court stated that "[i]n the final analysis, Brzonkala has alleged a flawed judiciary proceeding, the outcome of which disappointed her, but she has failed to allege facts that would support the necessary gender bias to state a claim under Title IX." *Id.* at 778–79. The case presented a cause of action alleging violation of the 1994 Violence Against Women Act. During July 1996, in the first case to assert a violation of the new law, the district court judge ruled that the Act was unconstitutional. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 801 (W.D. Va. 1996). The United States Justice Department had filed a brief in support of the law. *Id.* at 781.

The second case was commenced during 1996 by a female student, who sued the University of Nebraska and Christian Peter, a former defensive tackle for the school and fifth-round draft choice in the 1996 National Football League draft. The woman alleges that she was raped by Peter in 1991, and that she has asserted a violation of the Act. *Arena*, *supra* note 298, at A63.

592. 861 F. Supp. 367 (D. Md. 1994).

593. *Id.* at 369.

594. *Id.* (citing 42 U.S.C. § 2000e-(2)(a) (1995)).

595. *Ward*, 861 F. Supp. at 372.

pro quo or hostile environment. The Supreme Court recently elaborated on the hostile environment basis as a "middle path":

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment and there is no Title VII violation.[596]

The court further determined that the substantive law involved with Title VII sexual harassment would apply to a Title IX claim.[597]

On June 13, 1994, the Supreme Court, in *Karibian v. Columbia University*,[598] denied the University's petition for writ of certiorari regarding a collegiate female student-employee's Title VII claim against the University based on allegations of sexual harassment by her supervisor, pursuant to the theories of quid pro quo and hostile environment.[599] The Second Circuit held actual economic loss was not required to establish quid quo pro sexual harassment.[600] During June 1996, based on the University's failure to reasonably investigate the employee's sexual harassment claim, the district court judge vacated the jury's award of $450,000 in favor of the plaintiff against Columbia University.[601] However, the jury found no sexual harassment by the supervisor.[602] An appeal can be expected.[603]

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596. *Id.* at 373.

597. *Id. at* 375.

598. 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994). *See* Cohen v. Litt, 906 F. Supp. 957, 962–63 (S.D.N.Y. 1995) (ruling that the probationary elementary teacher's claim of hostile environment sexual harassment was not sustained pursuant to Title VII, where there was only a single unwelcomed sexual advance without any physical contact).

599. *Karibian*, 114 S. Ct. at 2693.

600. *Karibian*, 14 F.3d at 779.

601. *See* Karibian v. Columbia Univ., 930 F. Supp. 134 (S.D.N.Y. 1996).

602. *Id.* at 150.

603. *See also* Redman v. Lima City Sch. Dist. Bd. of Educ., 889 F. Supp. 288 (N.D. Ohio 1995) (discussing the suit instituted by a custodian against a school district for actions by the principal predicated upon Title VII sexual harassment). Another case, *Pinkney v. Robinson*, 913 F. Supp. 25 (D.D.C. 1996), involved allegations of sexual harassment, based on hostile environment pursuant to Title IX and Title VII, which the female plaintiff, the confidential executive secretary of the dean of the University of the District of Columbia, claimed the dean of the law school committed. The woman had been terminated for allegedly poor performance on the job. The district court ruled that the Title VII standards would be applied to the Title IX claim. *Id.* at 32. The district court rejected a strict liability application. *Id.* at 33.

G. *Cases Commenced by Individuals Charged with Sexual Harassment*

In *Coplin v. Conejo Valley Unified School District,*[604] an unusual case, the accused predator in a sexual harassment action, a male high school band member who had been charged with twenty incidents concerning female students and who further admitted to certain actions in a written document, subsequently sued various school administrators and the school district claiming a violation of due process.[605] The district court issued a judgment in favor of the defendants finding no violation, which the court based on its finding that the plaintiff and his parents knowingly and intelligently waived his right to a hearing.[606] The court rejected the plaintiff's contention that the school had to identify the plaintiff's accusers.[607]

VIII. LEGISLATIVE AND EXECUTIVE ACTION

A. *Congressional Action*

On May 9, 1995, the House Subcommittee on Postsecondary Education, Training & Life-Long Learning, chaired by Representative Howard "Buck" McKeehon (R-CA), held oversight hearings on Title IX and intercollegiate

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However, the court found that a material issue of fact existed as to the law school's procedures, which prevented the granting of the defendants' motion for summary judgment. *Id.* at 34.

604. 903 F. Supp. 1377 (C.D. Cal. 1995). *See also* Motzkin v. Trustees of Boston Univ., 938 F. Supp. 983 (D. Mass. 1996) (rejecting the theory set forth by an assistant professor, who had been terminated due to sexual harassment charges alleging violation of the American with Disabilities Act of 1990, 42 U.S.C. § 12101 (1994), claiming a psychological disorder, called disinhibition, for which he was being treated); Silva v. University of N.H., 888 F. Supp. 293 (D.N.H. 1994) (regarding a male professor who commenced a lawsuit challenging the University's determination of his alleged sexual harassment remarks, pursuant to the issue of academic freedom and violation of the First Amendment freedom of speech and abrogation of due process rights afforded pursuant to the Fourteenth Amendment); Yusuf v. Vassar College, 827 F. Supp. 952 (S.D.N.Y. 1993) (concerning a male student who questioned the school's internal sexual harassment policy which had charged him with sexual harassment of a female co-ed), *aff'd in part and rev'd in part*, 35 F.3d 709 (2d Cir. 1994). *See also Title IX Tickler*, NCAA NEWS, Apr. 29, 1996, at 17 ("Former San Diego State University's women's volleyball coach, Myles Gabel filed suit April 2 against the institution and individuals involved in the termination of his employment last year . . . [based on] alleged unprofessional conduct and a violation of the school's sexual harassment policy."). *See also* Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996) (discussed *supra* p. 623).

605. *Coplin*, 903 F. Supp. at 1379.

606. *Id.* at 1387.

607. *Id.*

athletics at the urging of the College Football Coaches Association and members on men's nonrevenue intercollegiate teams, especially wrestling teams.[608]

On August 3, 1995, Representatives Hastert and Johnson introduced a Title IX amendment. The bill would require that congressional funds could not be used by the OCR, unless it issued a new policy guidance to post-secondary institutions, which includes *objective criteria* clarifying how such institutions can demonstrate a history and continuing practice of program expansion for members of the underrepresented sex. No action has been taken on the bill, beyond being assigned to the appropriate committee. The issue should be moot with the issuance of the new OCR "Clarification of Intercollegiate Policy Guidance: The Three Part Test."

The General Accounting Office issued a report during October 1996 investigating Title IX compliance by schools nationally.[609] It was reported that the House of Representatives Committee on the Budget issued a report,

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608. *See* Report, *Hearing on Title IX of the Education Amendments of 1972 Before the Subcomm. on Postsecondary Educ., Training and Life-Long Learning*, 104th Cong. (1995). Witnesses included: Norma Cantu, Assistant Secretary of the OCR; Representative Cardiss Collins; Representative Dennis Hastert; Rick Dickson, Director of Athletics of Washington State University; Dr. Christine H.B. Grant, Director of Women's Athletics at the University of Iowa; Dr. Vartan Gregorian, President of Brown University; Wendy Hilliard, President of the Women's Sports Foundation; Dr. David L. Jorns, President of Eastern Illinois University; T.J. Kerr, wrestling coach at California State University of Bakersfield; and Charles M. Neinas, Executive Director of the College Football Association. Providing a national forum to presidents of two institutions, who were involved in ongoing Title IX actions (litigation at Brown University, and a compliance review initiated by the OCR examining Eastern Illinois University), should not have been permitted. There were no witnesses representing the female student athletes involved in those cases.

The Senate Committee on Commerce, Science and Transportation held hearings on October 18, 1995 on the Amateur Sports Act and the development of United States Olympic athletes. The representative of the National Association of Collegiate Women Athletic Administrators commented:

> [I]t is important to bear in mind the critical role that Title IX has played and must continue to play in order to ensure young women the opportunity to participate in competitive athletics. . . . [B]ut after Title IX was passed and opportunities became available, women's participation skyrocketed. If we have learned anything from this experience, it is that women are interested in playing sports and that *interest expands as opportunities expand.*

Amateur Sports Act: Hearing Before the Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism of the Committee on Commerce, Science, and Transportation United States Senate, 104th Cong. 200–03 (1995) (emphasis added) (testimony of Peggy Bradley-Dopps, Univ. of Mich.).

609. *GAO Report Cites Gender-Equity Advance*, NCAA NEWS, Nov. 4, 1996, at 5.

dated May 14, 1996, containing a proposal which "would essentially prohibit dollars being taken from an existing program and reallocate the money to efforts for gender equity."[610] Such a directive would be gilding the lily, as Title IX does not presently require that equivalent funding be afforded separate men's and women's athletic programs, but merely "necessary" funds.[611]

B. *Executive Action*

On November 29, 1995, the Department of Education issued its regulation, 34 C.F.R. § 668, entitled "Student Assistance General Provisions" (Final Rule)[612] implementing the 1994 "Equity in Athletics Disclosure Act," which became effective on July 1, 1996. The information that colleges and universities are required to provide must have been available by October 1, 1996, and must be available by October 15th of each of the following years.[613]

The school's report must contain the following information: 1) the number of male and female full-time undergraduate students that attended the institution; 2) a listing of the varsity teams that competed in intercollegiate athletic competition, and for each team the following data: i) the total number of participants, by team; as of the day of the first scheduled contest of the reporting year for the team, and ii) the total operating expenses attributable to those teams.[614] "Operating expenses" is defined as expenditures on lodging and meals, transportation, officials, uniforms, and equipment.[615]

It also directs information as to "[w]hether the head coach was male or female and whether the head coach was assigned to that team on a full-time or part-time basis."[616] It requires the average annual institutional salary of the head coaches and assistant coaches of the men's and women's teams.[617]

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610. Andrew Pittman, Ph.D., ed., *Dicta*, SSLASPA NEWSLETTER, Sept. 1996, at 5.

611. 34 C.F.R. § 106.41(c).

612. 60 Fed. Reg. 61,424 (1996).

613. 34 C.F.R. § 668.41(e)(2) (1996) (originally published at 60 Fed. Reg. 61,424, 61,433 (1995)).

614. *Id.* § 668.41(c)(1)–(2) (originally published at 60 Fed. Reg. 61,434 (1995)).

615. *Id. See also* Integrated Postsecondary Education Data System, effective July 1, 1994, which also requires that post-secondary institutions provide revenue and expense statistics within their athletic departments. *New Federal Regulations Require Schools to Compile Equity Reports*, SPORTS LAW., Vol. XIV, Spring 1996, at 3.

616. 34 C.F.R. § 668.48(c)(iii)(A).

617. *Id.* § 668.48(c)(7)–(8) (originally published at 60 Fed. Reg. 61,424, 61,434 (1995)).

Additionally, it mandates the total amount of money spent on athletically-related student aid, the total amount of expenditures on recruiting aggregately for all men's and women's teams, and the total annual revenues generated by the men's and women's teams.[618]

During January 1996, the OCR issued the official "Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test."[619] The January 16, 1996 letter from Assistant Secretary Cantu accompanying the final Clarification informs that:

> [T]he Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term 'developing interests' under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities . . . .[620]

Secretary Cantu summarized the three-part test by explaining that

> [t]he first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a 'safe harbor' for establishing that it provides nondiscriminatory participation opportunities. . . . The second part--history and continuing practice--is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part--fully and effectively accommodating interests and abilities of the underrepresented sex--centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.[621]

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618. *Id.* § 668.48 (c)(3), (5), (6). The district court judge ordered the NCAA to submit, by July 5, 1996, detailed information concerning the salaries of coaches and budgets of the athletic programs of member institutions in association with the case of *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995). The case challenged the Association's ruling restricting the amount of compensation certain part-time coaches of Division I schools can receive.

619. Letter from Norma Cantu, Assistant Secretary, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test* (Jan. 16, 1996) [hereinafter *Clarification*].

620. *Id.* at 2.

621. *Id.*

For satisfaction of prong one, substantial proportionality between the percentage of student athletes and full-time undergraduate enrollments, the Clarification states that, in determining participation opportunities, OCR counts the number of actual athletes participating in the athletic program.[622] The final Clarification provides a working definition.[623] It notes that, "[a]s a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR."[624] Additionally, "an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates."[625] The OCR stated that the requirement of "substantially" proportionate would be made "on a case-by-case basis."[626]

As to the second prong of a history and continuing practice of program expansion for the underrepresented sex, the OCR

> looks at the institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion . . . . [T]he focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.[627]

However, the OCR will accept as evidence of the second prong "an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students. . . ."[628] While it will not be acceptable to merely

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622. *Id.* at 2–3.

623. *Id.* at 3.

624. *Clarification*, *supra* note 619, at 3.

625. *Id.*

626. *Id.* at 4. However, the OCR notes that it

> would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.

Id. at 4–5.

627. *Id.* at 5–6.

628. *Clarification*, *supra* note 619, at 6. "[P]art two considers an institution's good faith remedial efforts through actual program expansion. . . . Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot

promise to expand the program for the underrepresented sex at some time in the future,[629] merely having a policy in place should not be permitted to satisfy prong two.[630]

Finally, as to the third prong, "the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students."[631] The Clarification also states that

> [i]n making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.[632]

Furthermore, "[a]n institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing.... These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities."[633]

Proposed revisions to the OCR Title IX Athletics Investigator's Manual are still under review. Additional comments were solicited during the beginning of 1995. Moreover, there has been no updated Policy Clarification concerning coaches compensation.

During the period from March 22, 1988 (when the 1988 Amendments to the Civil Rights Restoration Act of 1987 was adopted) to September 30, 1995, the OCR conducted only 50 Title IX compliance reviews of intercollegiate athletics programs among it's ten regional offices.[634] Also, individuals

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be considered remedial because they burden members of the sex already disadvantaged by the present program." *Id.* at 7.

629. *Id.*

630. *See, e.g.*, Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992) (concerning repeated attempts by female students over a period of about eight years, to establish a women's varsity ice hockey team at the University through the administrative process; however, they were consistently rebuffed), *vacated*, 992 F.2d 17 (2d Cir. 1993). *See also* Bryant v. Colgate Univ., No. 93-CV-1029, 1996 WL 328446 (N.D.N.Y. June 11, 1996) (discussed *supra* p. 579).

631. *Clarification*, *supra* note 619, at 9.

632. *Id.*

633. *Id.* at 10–11.

634. Based on information supplied by the OCR on November 8, 1995, pursuant to a Freedom of Information Act request of the Women's Sports Foundation (on file with the *Nova Law Review*).

filed ninety administrative complaints against post-secondary institutions.[635] For example, during May 1995, the OCR allowed Eastern Illinois University another opportunity to fashion a compliance action plan. This plan will permit the University to retain two men's teams and establish a women's golf team during the 1996–97 academic year.[636] On August 30, 1995, the administrative complaint filed by female athletes against the University of Pennsylvania was settled. It was reported that the University agreed, among other things, "to enhance its facilities and to bolster coaching staffs for women's sports."[637]

An administrative complaint was filed against Dearborn High School protesting the closing of a significant number of bathrooms in order to diminish student smoking.[638] It was alleged that this subjected the female students to urinary tract infections, thus discriminating against the female students in violation of Title IX.[639] The school reopened the bathrooms. Subsequently, based on the school district's actions, the OCR closed the case.[640]

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635. The OCR indicated it was concluding its monitoring activities overseeing the compliance action plan agreed to by the University of Toledo. The administrative complaint was filed on May 8, 1990. It took almost four years for the OCR to agree to a plan dated December 8, 1993. The University added two new varsity teams for women, golf and soccer, and also expanded the size of some of the existing women's intercollegiate teams. OCR File No. 5-90-2070 (Region V) (Final Monitoring Letter, Apr. 17, 1996) (on file with the *Nova Law Review*). The University of Minnesota indicated that during October 1995, the women's club ice hockey team would be elevated to a varsity team effective during the 1996–97 academic year. Jody Smith, *University of Minnesota Adds Women's Ice Hockey*, WOMEN'S SPORTS EXPERIENCE, Feb. 1996, at 13. During May 1996, Johns Hopkins University announced it was elevating its women's lacrosse program from Division III to Division I beginning during the 1998–99 academic year. The University of Pittsburgh "announced it was eliminating its men's tennis and gymnastics programs in a move motivated by Title IX." *Title IX and the Elimination of Men's Athletic Programs*, SPORTS LAW., Vol. XIV, Spring 1996, at 5.

636. *Sidelines*, CHRON. HIGHER EDUC., May 5, 1995, at A43.

637. Douglas Lederman, *Athletic Notes: U. of Pennsylvania Settles Sex-Bias Dispute*, CHRON. HIGHER EDUC., Sept. 8, 1995, at A61.

638. Maryanne George, *Dearborn Schools Sued for Locking Bathrooms*, DETROIT FREE PRESS, May 11, 1995, at 1B, 2B.

639. "Because women contract urinary tract infections at 30 times the rate of men and need more time for personal hygiene, [attorney, Jean Ledwith] King charges the locked restrooms subject the 600 female students to a much higher risk of health problems than male students." *Id.* King has been an advocate for gender equity on the state and national level for 25 years. She represented the students in the administrative complaints filed against University of Toledo and Eastern Kentucky University.

640. OCR File No. 15-95-1139 (closing letter from the OCR Region V, June 7, 1995).

IX. CONCLUSION

The Title IX decisions rendered since 1994 illustrate, in some instances, polar or contradictory results on the same issues. This is in part fostered by the cursory language of the Title IX statute and the absence of legislative history, or even of regulatory guidance concerning the myriad conditions that may give rise to a claim of sex discrimination involving educational institutions which are recipients of federal funds. The 1992 Supreme Court decision in *Franklin* continues to have a significant fallout. In allowing monetary damages, the number and breadth of Title IX issues has increased dramatically, as evidenced by the decisions reviewed herein, compared to the total case law issued prior thereto. The cases clearly exemplify that female students and educational employees are still subject to second class status on a nationally. The unveiling of the odious examples of sexual abuse of female students predicated by male educational employees is a disturbing aspect. The "glass sneaker"[641] still exists in the area of interscholastic and intercollegiate athletics for female students and prospective female coaches and athletic directors.

First, while the decisions uniformly demonstrate a greater reliance on Title VII to fill in the gaps or to borrow the standards and relevant case law in the sexual harassment area, there is also prior case law instructing that Title VI should be the focal point for reliance in explicating Title IX claims. Second, since the Title IX statute contains no express statute of limitations, the courts have been forced to borrow state statutes of limitations based on differing related causes of actions (predominantly personal injury actions, as was adopted by the Eighth Circuit in the *Egerdahl* ruling and the Sixth Circuit in *Lillard*, versus civil rights actions), which may give potential plaintiffs dramatically different time frames within which to initiate their lawsuits. Third, the courts are ready to recognize a claim of retaliation pursuant to Title IX, as was implicitly done by the Second Circuit in *Murray* and explicitly done by the district courts in *Clemes* and *Clay*. Fourth, interestingly Title IX exempts same sex public military schools from its ambit. However, the "separate but equal" argument utilized by these schools was deployed by the 1996 Supreme Court decision in *United States v. Virginia*,[642] thus rendering moot any argument as to whether the statute should be amended to eliminate the exception.

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641. The author coined this term in her first law review article. *See* Heckman *supra* note 92, at 63.

642. 116 S. Ct. 2264 (1996).

Fifth, while the Ninth Circuit in *Jeldness* recognized a Title IX cause of action for female prisoners at state prisons, the district court in *Archer* found no Title IX cause of action for female prisoners at federal prisons, which are clearly recipients of federal funds and belies the whole notion of prohibiting sex discrimination in education. This also raises the question as to whether some provision should be made to bring educational programs at federal prisons within the ambit of sexual discrimination protection, whether pursuant to Title IX or independently.

Sixth, in the area of athletic programs and activities, the cross-over cases which had been so instrumental, especially on the interscholastic level during the first twenty years of Title IX's existence has dwindled significantly to a handful of cases during the 1990s, with minimal case law during this three-year period. Rather, the "equal opportunity" cases, especially on the intercollegiate level, have since come to the forefront in a dramatic way during the 1990s. During 1996, the First Circuit in *Cohen* again favorably resolved an appeal in favor of the female student athletes.[643] The First Circuit recognized the impact of Title IX stating:

> There can be no doubt that Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports. In addition, there is ample evidence that increased athletics participation opportunities for women and young girls, available as a result of Title IX enforcement, have had salutary effects in other areas of societal concern. . . .
>
> One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX's beneficent effects on women's sports, as the athletes themselves have acknowledged time and again. What stimulated this remarkable change in the quality of women's athletic competition was not a

643. 101 F.3d 155, 188 (1st Cir. 1996). The University filed a petition for writ of certiorari during February 1997. The Supreme Court denied review in two prior "equal opportunity" cases on behalf of collegiate athletes—*Roberts v. Colorado State Univ.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993) and *Kelley v. Board of Trustees of Univ. of Ill.*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

> sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports.[644]

The uniformity of the circuit courts in adopting or condoning the three-part "effective accommodation" test, as was done by the First, Third, Sixth, Seventh, and Tenth Circuits, was disregarded in January 1996 by a federal district court in *Pederson*, yielding for a possible appellate determination by the Fifth Circuit. However, even in *Pederson*, the female student athletes were successful in proving that the University had violated Title IX, which continues the results of all the "equal opportunity" cases brought on behalf of collegiate female students who have been successful in persuading the courts of their gender equity plights. Conversely, the male collegiate athletes, who have sought restoration of their varsity teams, have all struck out in the judicial arena. Interestingly, no cases were instituted during the applicable time frame seeking reinstitution of women's varsity intercollegiate teams. Perhaps the post-secondary institutions are examining the issue of Title IX compliance and the NCAA gender equity certification requirements before embarking on the elimination of established women's intercollegiate teams, especially when the percentages of female students and female student athletes as compared to the male student athletes is so skewed.

Seventh, while females continue to be shortchanged in gaining employment as coaches of men's teams, or as athletic directors running men's or women's athletic programs, or as head sports information directors, no litigation has been brought to spotlight this anomaly. Instead, the battlefront concerns the equal pay and termination and/or retaliation claims brought by coaches of women's teams (male and female) or female athletic administration employees. The three federal predicates are Title IX, Title VII, and the Equal Pay Act. The 1993 Ninth Circuit decision in *Stanley,* which focused solely on the Equal Pay Act, continues to garner stature as a basis for finding that the duties and responsibilities of the coach of men's intercollegiate (basketball) team were different than the duties and responsibilities of the coach of women's intercollegiate (basketball) team. The decision was relied upon by the federal district courts in the *Deli* and *Bartges* decisions and the District of Columbia Superior Court in the *Tyler* decision. To date, no courts have examined the Title IX regulations operative in this area and the exact import that they possess. The Ninth Circuit heard another appeal in *Stanley* during 1996. During 1996, the Fourth Circuit affirmed the lower

644. Cohen v. Brown Univ., 101 F.3d 155, 188 (1st Cir. 1996) (citations omitted).

court's decision in *Bartges* without commenting on the Title IX regulations, and the parties settled the *Tyler* case. The two *Deli* decisions addressed comparisons of the women's gymnastics and assistant gymnastics coaches with non-gymnastics coaches. The *Bartges* case was a hybrid seeking comparison of the women's softball coach with the men's baseball coach, as well as other coaches. The first reverse discrimination suit was brought by a former men's basketball coach, dissatisfied about receiving the salary that the women's basketball coach was getting. The OCR should issue a revised policy clarification concerning the compensation area, especially when differences hinge on the sex of the athletes coached, rather the sex of the coaches.

Eighth, none of these decisions held that an athletic employee of a University or college that received federal funds was precluded from setting forth a Title IX cause of action. However, this is at variance with a number of other decisions involving educational employees generally.

Ninth, there is a lack of consensus on whether an individually named defendant, who is an employee or a representative of the governing authority such as a school board member, may be named as a party in a Title IX action. Tenth, a number of courts would apply the Title VII standards to Title IX cases of sexual harassment and even retaliation claims.

Finally, when sexual abuse or molestation of a student occurs, as opposed to when nonphysical sexual harassment, should the educational institution be held to a negligence standard of failing to properly act after notice (whether actual or constructive) based on the clearly intentional and egregious actions by their employees or agents; or should strict liability be imposed? Presently, the majority posture as represented in *Canutillo Independent School District* calls for "two distinct actions or inaction, at least one of which is intentional in nature, on the part of an employee and on the part of the school district . . . Title IX does require proof of negligent, reckless or intentional acts by the school district, independent of the intentional conduct of the employee."[645] While arguably the minority position, the logic for assigning strict liability in Title IX sexual abuse cases, as in *Leija,* has merit. Clearly, as the judge issued in *Leija*, the educational institution should be sacrosanct from any and all sexual abuse of students. However, a restriction on the amount of compensatory damages, as the judge urged in exchange for imputing the strict liability standard, remains open to attack for the reasons advanced herein. On whom should the burden lie to

645. *Id.* at 847.

obviate the liability of the educational institution in the employment and monitoring of its employees: the second grade student or the educational institution? As the Eleventh Circuit in *Davis* cogently stated, "a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education."[646]

In the hostile environment cases, the Title VII standard appears to continue in the Title IX cases, including the peer sexual harassment cases. However, the courts should carefully scrutinize whether the actions by the educational institutions are protective, timely, and comprehensive enough after being informed of possible unwanted sexual harassment. Assuming the reliance on Title VII, it will be interesting to watch for the first judge to modify a Title IX award to the $300,000 maximum that an individual may collect in a Title VII case. Title IX presently contains no restriction on the amount of monetary damages that may be awarded. The OCR should also issue an updated policy clarification on sexual harassment in education, analyzing the myriad types of harassment that may occur.

Thus, the 1990s will continue to unfold the parameters of Title IX protection, through the judicial process and possibly through the legislative process, especially in light of some of the erratic decisions rendered during the applicable time frame. The gender line in athletics continues to be the kryptonite vault line. The Title IX paradigm remains a work-in-progress.

646. *Davis*, 74 F.3d at 1194.